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REPORTS

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IN THE

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OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES AND PRINCIPAL MATTERS.

By JAMES B. BLACK,
OFFICIAL REPORTER.

VOL. XXXIII.

CONTAINING THOSE CASES DECIDED AT THE MAY TERM, 1870, NOT PUBLISHED IN VOL. XXXII., AND SOME OF THE CASES DECIDED AT THE NOVEMBER TERM, 1870.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1870, IN THE FIFTY-FOURTH YEAR OF THE STATE.

JOHNS *v.* SEWELL.

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145 337

VENDOR AND PURCHASER.—*Lien.*—*Volunteer.*—*Notice.*—A. held certain real estate by title-bond from B., who held the legal title, A. having fully paid him the purchase-money. C. purchased said real estate from A. and gave his promissory note to A. for a portion of the purchase-money, and A. directed B. to convey to C.; but by C.'s procurement, B., without the knowledge or consent of A., conveyed to C.'s wife, who was a volunteer. Afterwards D. purchased the property from C. and took a conveyance executed by C. and wife, with notice that C. owed the unpaid purcase-money for which he had given said note.

Held, in a suit by the assignee of said note to enforce a vendor's lien upon said land in the possession of D., that the complaint was not insufficient for not alleging that D. had notice that C.'s wife was a volunteer.

Held, also, that A. had an equitable lien on the land for the unpaid purchase-money due him, which lien passed to the assignee of said note.

APPEAL from the Fountain Circuit Court.

FRAZER, J.—It is assigned for error that a demurrer to the complaint was overruled, and this presents the principal question in the case. The facts averred were, that Oliver P. West purchased certain real estate from Donaldson, and gave the latter his promissory note for a portion of the pur-

chase-money, which note Donaldson assigned to the plaintiff; that Donaldson at the time held the property by title-bond from one Lacy, his vendor, to whom he had fully paid the purchase-money, and who held the legal title, and whom he directed to convey to said Oliver P. West; that by the procurement of the latter, Lacy conveyed to West's wife, without Donaldson's knowledge or consent; that West's wife was a volunteer, paying nothing; that the appellant, Johns, afterwards purchased the property of West and took a conveyance executed by West and wife, with notice that West owed the unpaid purchase-money for which he had given the note aforesaid. The ruling sought as against the appellant Johns, was to enforce a vendor's lien upon the land.

The objection against the complaint most pressed is, that it does not appear by its averments that Johns had notice that Mrs. West was a volunteer. No authority is cited in support of this objection, and it seems to us that it cannot be maintained upon any sound principle. We understand quite well that a purchaser with notice of an outstanding equity may protect himself by showing that his vendor had no notice, and therefore held the estate purged of the equity. This rule is intended for the protection of him who held the estate discharged of the equity, that he may be enabled to realize the best price which the property will command; and to that end he can transmit to his vendee as good a title as he holds. His vendee with notice is favored, not on his own account, but for the sake of him from whom he purchased. But even this is matter of defense, and need not, perhaps, be anticipated and traversed by the complaint. But where, as in this case, it appears that the intermediate grantor was a volunteer who paid nothing, and therefore held the estate charged with the lien, the next purchaser, having notice of the unpaid purchase-money, cannot mock a court of equity even by averment and proof that he did not know that his vendor was a volunteer. Common honesty required of him, before he took

the conveyance and paid his money, to ascertain and be assured that he took it from one who held the property free from the lien of which he had express notice—if by taking it he could remove it from the reach of the lien. If he chose to make no such inquiry, it must have been in the hope that ignorance, thus self-imposed, might serve his interests better than a knowledge of the facts. Thus we may assume that he reasoned: I know that West owes Donaldson purchase-money upon this land; but I find the title in Mrs. West, who may be either a volunteer or a purchaser for value with or without notice; upon that subject I am not informed, and I am safe if I do not ascertain. If I remain in ignorance it will not matter to me what the fact really is, but it may cut off any equity which Donaldson could assert against the property in Mrs. West's hands. At any rate, this is the unconscionable and dishonest course of conduct to which this court will give its sanction and license if we hold the complaint bad because it does not allege that the appellant had no notice that Mrs. West was not a purchaser for value; and the doctrine ruled would be this: a purchaser from a volunteer, with express notice, will be protected unless he also had notice that his vendor was such volunteer. We are not prepared to approve so plain and easy a method of purging estates of outstanding equities against them.

Another question touching the sufficiency of the complaint is, whether Donaldson, who held the property by title-bond, having fully paid for it, but who never had the legal title, had any equitable lien for unpaid purchase-money due to him. It is inferred from the opinion in *Work* v. *Brayton*, 5 Ind. 396, that the judges of this court were not at all agreed in that case upon the question whether the equitable lien for purchase-money exists when the actual vendor held only a title in equity, and the conveyance was made direct, as in this case, from the party holding the legal title in trust. The appellant cites *Strider* v. *King*, 3 Cranch C. C. 67, as in point against the lien upon this ground. It must be

admitted that it is so, though in that case there was no necessity whatever for any expression of opinion upon the subject, for a separate security for the purchase money had been taken. The opinion as reported gives neither authority nor reason in support of it. So far as we know, that case stands alone. Where a purchaser has paid the whole purchase-money, he is, in equity, regarded as the real owner of the land for every purpose. He is so in very substance, and a conveyance to him is but a compliance with a form of law. It would be a surprising doctrine, that a court of equity would so stick upon form, in utter disregard of right, as to deny to him the implied lien for purchase-money, which it would give if he had held also the legal title. No such distinction is hinted at in the text books, and we are unable to conceive of a plausible argument to sustain it.

Another question made against the ruling of the court below upon the demurrer is, whether the vendor's lien passes to the assignee of a note given for purchase-money. It has been held that it does not, in Arkansas, Tennessee, Georgia, Mississippi, Ohio, and Maryland. But in this State it has been adjudged otherwise from the beginning. *Lagow* v. *Badollet*, 1 Blackf. 416; *Brumfield* v. *Palmer*, 7 Blackf. 227; *Fisher* v. *Johnson*, 5 Ind. 492; *Kern* v. *Hazlerigg*, 11 Ind. 443. A rule of property so long maintained, and from time to time reiterated by the court of last resort, cannot now be deemed open to discussion. We should so determine, even if satisfied that the rule was not originally well founded. But if the question were an open one, we would not hesitate to decide the same way. We are not in accord with the opinion, sometimes expressed in the reports, that the doctrine of equitable lien for purchase-money is mischievous, and in which it is denounced as a *secret* lien, an epithet the accuracy or propriety of which is not very apparent when it is remembered that the lien only follows the land in the hands of a purchaser who has paid value and taken a conveyance *with notice*. We have no temptation, therefore, to hedge in the conceded right with limitations which

greatly tend to impair its utility and value, and which, it seems to us, set at naught some very plain rules which are uniformly applied in analagous cases. The incident generally follows the principal thing, and in all other cases that now occur to us the security is carried by the transfer of the debt. It is so with a mortgage, or collateral guaranty, or pledge. Why should it not be so with a vendor's lien? What injustice could ever result? Why impair the beautiful harmony and the broad and enlightened policy of equity jurisprudence by applying to cases essentially similar diverse and antagonistic rules? Indeed, the whole reasoning by which it has been attempted to introduce this anomaly goes to support an entirely different proposition, to wit, that very satisfactory proof of notice should be required to charge the land in the hands of a subsequent purchaser, a proposition just in itself and well sustained by the cases, but which, it may be, has not always been applied.

What has been already said disposes of the instruction asked by the defendant and refused by the court. We cannot reverse upon the evidence.

Judgment affirmed, with costs.

Gregory, J., does not concur in the entire opinion of the court in the foregoing case.

T. F. Davidson, for appellant.

W. H. Mallory for appellee.

Case *v.* Wolcott.

Vendor and Purchaser.—*Forfeiture.—Notice.*—A contract for the sale and conveyance of real estate contained a stipulation, that a non-compliance with the terms of the contract, or any of them, by the vendee should work a forfeiture of all right under the contract at the option of the vendor, but upon previous notice, of a specified period, to the vendee, demanding a

fulfilment and specifying such feature or features as it should be deemed had not been complied with.

Held, in an action by the vendee, who had partly performed the contract on his part, against the vendor for wrongfully declaring a forfeiture and thereby putting it out of the power of the vendee to further carry out the contract according to its terms, that the stipulation for said notice was for the benefit of the vendee, and a strict compliance with it by the vendor was necessary before declaring a forfeiture.

Held, also, that where the vendor, after giving to the vendee a notice not in strict compliance with said stipulation, and while the contract was therefore in full force, by declaring a forfeiture put it out of the power of the vendee to carry out his part of the contract, the vendee was not required to perform or offer to perform, but might have his action for being so prevented.

SAME.—*Measure of Damages.*—Where after part performance of a contract for the conveyance of real estate, by the vendee, the improvements made by him being contemplated by the contract, the vendor by his own wrongful acts puts it out of the power of the vendee to fully comply with the provisions of the contract, the measure of damages in an action by the vendee against the vendor, for such breach, is the difference between the unpaid purchase-money and the actual value of the lands at the time of the breach.

APPEAL from the Tippecanoe Circuit Court.

GREGORY, J.—Wolcott sued Case upon the following written contract, executed by them:

"This agreement, made this 20th day of August, 1856, between Albert S. Case, of the city of New York, party of the first part, and Anson Wolcott, of the same place, party of the second part, witnesseth, that the said party of the first part has sold to the party of the second part all those certain tracts or parcels of land situate in the county of Benton, State of Indiana, which Henry L. Ellsworth has heretofore located in the said county of Benton, for the party of the first part, amounting to five thousand and ninety-six and eighty-one one hundredths acres, a schedule of which lands is hereto annexed, and said party of the first part agrees to make good and sufficient titles, and free from all incumbrances whatsoever, to said lands, at such times, and in such amounts, and to such parties, as the party of the second part shall request. *Provided*, that before such titles are made, improvements shall have been made upon the lands embraced therein, in value equal to

two and a half dollars per acre upon the whole amount of land contained in any such title or conveyance, or that the sum of two dollars and a half per acre shall have been paid or safely secured payable in one year, with annual interest at the rate of seven per cent. per annum, to the party of the first part, or that the amounts so paid or secured, together with the amounts of improvements so made shall together be equal to two and a half dollars per acre. In all cases of conveyances, unless the lands are paid for or otherwise satisfactorily secured, bonds and mortgages for the purchase-money, or any balances that may remain, shall be executed and delivered to said Case at the time of the delivery of the deed by him, which mortgages shall cover all improvements on said lands so conveyed.

"The said party of the second part hereby agrees to pay the party of the first part five dollars per acre for all of said lands, together with annual interest at the rate of seven per cent. per annum from the first day of September, 1856, said interest to be paid annually, on the second day of January in each year, in the city of New York, and to pay the principal sum in six equal annual payments, the first payment to become due and payable on or before the first day of January, 1858, and similar payments also on or before the first day of each succeeding January until the whole sum is paid.

"The said party of the second part also agrees to pay all taxes upon said lands hereafter, as they may become due and payable. It is agreed and expressly understood between the parties hereto, that the party of the second part shall sell said lands with all convenient dispatch, but not for less than five dollars per acre; that all proceeds of sale shall be taken by the party of the first part as payment upon this contract. Such proceeds are intended to mean and do mean cash and cash securities, taken upon sale, bonds and mortgages upon the lands sold, and contracts and agreements to purchase lands where no conveyance has been made; but in all cases when improvements, securities, or

payments have been made to the amount of two and a half dollars, as hereinbefore stated.

"No such bonds and mortgages or contracts shall by their terms extend the time of payment longer than hereinbefore stated, to wit, six annual payments. Whenever the party of the first part shall have received in cash, securities, bonds and mortgages or contracts of the lands sold, the whole amount for which the lands are hereby sold, he shall convey to the party of the second part, his heirs or assigns, by deed of warranty, and free from all incumbrances, all of said lands which shall then remain unsold. A non-compliance with the terms of this contract, or any of them, by the party of the second part, shall work a forfeiture of all right under this contract, at the option of the party of the first part; but upon thirty days previous notice to the party of the second part, his heirs or assigns, demanding a fulfilment and specifying such feature or features as it is deemed have not been complied with."

After alleging the execution of this agreement, making the same a part of his complaint, the appellee made the following averments: "The plaintiff avers that on the 1st day of January, 1857, he paid to the said defendant the sum of six hundred and thirty-one dollars and fifty-four cents, as and for the interest then due on said agreement; that immediately after the execution of said agreement he entered upon the performance of the same, and in so performing and improving the land described in the schedule annexed thereto, by breaking and plowing the same, and building houses thereon (said lands being at the time wild and uncultivated), and in offering them for sale, and procuring settlers thereon, he expended, after the execution of the agreement, and before the 1st day of January, 1858, the sum of five thousand dollars; that after the execution of said agreement and before the first day of January, 1858, he contracted to sell to one John Fleming two hundred acres of the lands referred to in the agreement, at five dollars an acre, and to one George W. Haggard four hundred

and twenty-two acres, at fifteen dollars an acre, all of which lands had been improved by him before the sales thereof, in value exceeding two dollars and fifty cents an acre; that the purchase-money for the lands sold to Fleming was duly secured by bond and mortgage, and for the lands sold to Haggard by written contract, signed by Haggard; which bond and mortgage and contract were afterward, and before the first day of January, 1858, duly transferred to the defendant, and by him duly received and accepted as so much cash paid by the plaintiff on the agreement sued on, and receipted for by the defendant accordingly, which fully paid and more than paid and satisfied all that was due from the appellee on the agreement sued on, on the 1st day of January, 1858; that he (the plaintiff) had performed all the conditions specified in the agreement sued on, on his part to be performed, but that, nevertheless, the defendant did, about the first day of March, 1858, repudiate the agreement sued on, and refuse to be bound thereby, and has ever since refused to be bound thereby; that with a view to carry out the alleged fraud more effectually, the defendant, on or about the first day of March, 1858, falsely circulated and published in the community in which the lands are located, that the plaintiff had forfeited all rights under the agreement sued on, by failing to comply with his part of the same, thereby hindering and absolutely preventing the plaintiff from proceeding with the execution of his contract; that at the time the defendant so refused to proceed with the execution of the contract sued on, the lands referred to in the schedule annexed thereto had increased in value over and above the contract price about twenty thousand dollars."

The defendant answered in six paragraphs:

1. A general denial.

2. A paragraph denying that the Fleming mortgage and the Haggard contract were received as payment upon the contract between plaintiff and defendant, and averring that

there became due on the 1st of January, 1858, $4,247.34 of principal, and on the 2d day of the same month, $1,783.88 of interest to the defendant, which was left unpaid; wherefore he gave plaintiff notice on the 4th of January, 1858, of such failure, that it would be optional with defendant after thirty days to abrogate the agreement sued on; and on the 5th of February, 1858, he notified plaintiff by letter, that said contract was forfeited by him and was therefore abrogated by defendant; a memorandum of which abrogation was filed in the office of the recorder of Benton county, where the lands were situated, in these words:

"*To whom it may concern:* Notice is hereby given that whereas I entered into an agreement with A. Wolcott on the 20th day of August, 1856, by which I agreed to sell the said Wolcott five thousand and ninety-six and eighty-one one hundredths acres of land, situated in the county of Benton, State of Indiana, on terms and conditions set forth in said agreement; and *whereas* one of said conditions is in words following, to wit: 'a non-compliance with the terms of this contract or any of them by the party of the second part (viz., said Wolcott), shall work a forfeiture of all rights under this contract, at the option of the party of the first part (to wit, myself), but upon thirty days previous notice to the party of the second part (to wit, said Wolcott), his heirs or assigns, demanding a fulfilment and specifying such feature or features as it is deemed have not been complied with; and *whereas* such notice and demand were given by me to the said Wolcott, on the 4th day of last month, being more than thirty days, by letter directed to him at Lockport, State of New York, his last known place of residence: Now, then, this is to give public notice that I have abrogated, and do hereby abrogate and make wholly void, the contract aforesaid between myself and the said Wolcott, dated on the 20th day of August, 1856, as aforesaid. All parties who have or claim to have any rights which are now, or which hereafter may be, affected by the abrogation of

said contract are requested to notify me, stating directly in what said rights consist.

"Witness my hand and seal at the city of New York, this 5th day of February, 1858.

"A. S. CASE." [SEAL.]

Wherefore, defendant prayed judgment, &c.

3. That the plaintiff, anticipating his inability to pay the $6,031.22 due defendant on the 1st and 2d days of January, 1858, on the 7th of November, 1857, made a pretended sale of four hundred and twenty-two acres of the land to one George W. Haggard, a stranger to defendant, and who was irresponsible, and on the 19th of December following, called upon the defendant in New York City, and fraudulently assured him that said Haggard was good and would pay for the lands, and desired defendant to accept his contract as a payment on the contract of August 20th, 1856, which defendant refused to do, but took an assignment of it to hold until the first instalment should mature, and credit the same if paid, which contract with Haggard is in these words:

"Agreement made this 7th day of November, 1857, between Anson Wolcott, of New York, party of the first part, and George W. Haggard, of Iroquois county in the State of Illinois, party of the second part, *witnesseth*, First. That the party of the second part promises, covenants and agrees to pay the party of the first part, his heirs, executors, administrators, or assigns, the sum of six thousand three hundred and thirty-two dollars and seventy-five cents, in manner following, to wit: in six equal annual instalments, the first instalment to become due and payable on or before the 1st day of January, 1858, and in similar payments also on or before the first day of each succeeding January, until the whole sum is paid, with interest at the rate of seven per cent. per annum, to be paid annually on the second day of January hereafter, in the city of New York.

"Second. In consideration of the above covenants and agreements, to be kept and performed by the party of the

second part, the party of the first part covenants and agrees to sell and convey by a good and sufficient deed of warranty, and free from all incumbrances, or cause the same to be done, to the party of the second part, those certain tracts of land," &c. "It is understood that if desired a deed will be given and a bond and mortgage taken for the balance of the purchase-money after the first payment has been made, if desired by the party of the second part.

"In witness whereof, the parties aforesaid have hereunto set their hands and seals, the day and year aforesaid.

"A. WOLCOTT.

"G. W. HAGGARD."

This contract was acknowledged before a notary, and assigned by Wolcott to Case.

The defendant averred that Haggard, who was a stranger to him, was wholly irresponsible, as plaintiff well knew; that he failed to pay the instalment in January, 1858, on his contract above copied, wherefore defendant notified plaintiff of the default, by letters written on the 4th and 10th of that month, in the latter of which the Haggard contract was tendered back, which letters were duly received and acquiesced in by plaintiff, wherefore he forfeited all rights under the contract sued on.

4. The same facts, substantially, as in the third paragraph, except no fraud is alleged on the part of the plaintiff with reference to the assignment of the Haggard contract, and his failure to pay is relied upon as a defense.

5. The fifth paragraph sets up an abandonment of the contract sued on by the plaintiff.

5. The sixth paragraph of the answer sets up the facts as to the making of the Haggard contract and its assignment, the failure to pay the first instalment due upon it, the notice of the failure, and the subsequent abrogation by the defendant.

The plaintiff demurred to the 2d, 3d, and 4th paragraphs of the answer. The demurrer to the 4th was sustained, but those to the 2d and 3d were overruled.

Replies in denial were then filed to the 2d, 3d, 5th, and 6th paragraphs, and the issues thus made were submitted to a jury.

The evidence is all in the record, and that introduced by the plaintiff and controverted by the defendant tends to prove that, in the summer of 1857, Wolcott entered upon the lands and expended some two thousand dollars in improving, and made efforts to induce settlers to go upon them; that in anticipation of the railroad from Logansport to Peoria, then located and afterwards built near them, they appreciated in value rapidly after Wolcott purchased; that Haggard, at the time of the sale to him, was an industrious, energetic man and reputed responsible; that Wolcott supposed him able to make his payments as stipulated, and assigned the contract to Case in good faith as a payment on the purchase-money to him; and that when he declared the agreement between him and Wolcott abrogated, the lands were worth from seven to ten dollars per acre.

The evidence introduced by the defendant and controverted by the plaintiff tends to prove that Haggard was wholly insolvent, and the sale to him was not made in good faith; that the contract between him and the plaintiff was assigned to the defendant, not in payment, but to be held by him, and if the first instalment was paid it should be credited to the plaintiff; and that the lands at the time of the abrogation of the contract by the defendant were not worth to exceed four dollars per acre—less than what was due on them from the plaintiff—so that he sustained no damages by the abrogation. The evidence introduced by the respective parties, about which there is no conflict, clearly establishes the following facts: That the parties entered into the contract sued upon; that some two hundred acres were sold and conveyed to Fleming, and one thousand dollars of the purchase-money paid to the defendant in six annual instalments; that one thousand dollars thereof was paid to the plaintiff in a farm in New York; that Haggard and the plaintiff were upon very intimate terms and about

embarking in a banking business in Indiana, upon a charter of a land company, granted by the Legislature of Connecticut; that the contract was made between the plaintiff and Haggard, which was assigned to defendant, but that Haggard gathered the wheat crop on the premises and then abandoned the land and never paid a dollar to the defendant upon it; that the defendant immediately after the first instalment became due from Haggard, made inquiries about him and was informed that he was insolvent, whereupon he addressed to plaintiff, at Lockport, New York, the following letters:

"NEW YORK, January 4th, 1858.

"MR. A. WOLCOTT:

"*Sir*, Mr. George W. Haggard has made default in the first payment upon his contract, and inasmuch as this payment was so small and so recently contracted, it looks very suspicious. However, I find that I can soon be in possession of information which will enable me to say definitely whether the contract is such a one as I ought or I am bound to receive as part payment upon the agreement between you and me, dated the 20th of August, 1856; but whether or not it will answer as such payment, I am quite clear that it will not answer as payment of the interest due from you to me, in this city, on 2d of this month, or as a payment of any considerable portion of the principal due me the 1st of this month, on your agreement as aforesaid; so that you are in default in the payments both of interest and principal on said agreement, and it will be optional with me to abrogate said agreement between you and me, dated August 20th, 1856, after thirty days. If Mr. Fletcher has any pecuniary interest in said agreement, please show him this letter. "Very respectfully,

"A. S. CASE."

"NEW YORK, January 10th, 1858.

"MR. A. WOLCOTT:

Sir, I am in receipt of answers to my inquiries as to the responsibility, &c., of Mr. George W. Haggard, which

are, that he has little or no property, and that his reputation for paying his debts is not good. These answers, in connection with the facts that he made default in the first payment falling due on his contract, so soon after making it, and that he has paid nothing on the land, are conclusive to my mind that your contract of sale to him, which you assigned to me, is not such a paper as I ought to receive in payment or part payment to me on your contract with me, and hence I decline to receive it. Your contract with Mr. George W. Haggard, which you left with me, is held subject to your order. "Very respectfully,

"A. S. CASE."

"NEW YORK, February 5th, 1858.

"MR. A. WOLCOTT:

"*Sir*, I have availed myself of the condition in my agreement with you for the sale of lands in Benton county, Indiana, dated August 20th, 1856, giving me option to abrogate said agreement upon your failure to comply with all its provisions, and upon the thirty days notice, which has been given you, to abrogate the same, by placing on record such abrogation in the register's, or recorder's, office in said county of Benton. "Very respectfully yours,

"A. S. CASE."

A copy of the instrument recorded, which has been set out above, accompanied this letter.

The defendant at the proper time asked the court to charge the jury as follows:

"1. This suit having been brought for a breach of the contract by the defendant, it is incumbent upon the plaintiff to show that he substantially complied with all its provisions on his part; and if he has failed to show such compliance, he cannot recover in this action.

"2. By the terms of the contract, there became due the defendant on the 1st day of January, 1858, the sum of $4,247.34 of principal, and on the next day, $1,783.88 of interest; and if you find that the plaintiff failed to pay those sums, and the defendant in a reasonable time thereafter

notified him of such failure and that if the payments were not made the contract would be abrogated after thirty days, and the default of plaintiff continuing, the defendant, after the expiration of the thirty days, did abrogate the contract or declare it forfeited, and notified the plaintiff thereof, then there can be no recovery in this suit.

"3. The provision in the contract between the parties giving the privilege to the plaintiff to make payments to the defendant for the lands in the obligations of purchasers given upon the sales of lands by the plaintiff, contemplates, and the law requires, that such obligations should have been given upon *bona fide* sales to parties who were believed by the plaintiff to be able to perform their contracts; and if you find from the evidence that the sale to George W. Haggard was not made in good faith, and that he was irresponsible and not able to meet his payments, and the plaintiff had notice of those facts, and if the defendant was ignorant of the character of the sale, and of the inability of Haggard to perform his contract, then the acceptance of the contract by the defendant upon the representations of the plaintiff that Haggard was responsible and would pay for the lands would not bind the defendant, and if Haggard made default the defendant would not be bound to retain the Haggard contract or apply it as a payment on the money payable from plaintiff.

"4. If you find from the evidence that George W. Haggard at the time he made the contract with plaintiff was not responsible and made default in the payment of the instalment due January 1st, 1858, and that the plaintiff represented to the defendant when he assigned the contract to him that Haggard was responsible, and the defendant was ignorant of his character, then the defendant was not bound to retain the Haggard contract as a payment on the contract with the plaintiff.

"5. Even if you shall find that the defendant received the Haggard contract, and it was a payment upon the contract between the plaintiff and defendant, it could only operate

as a payment upon the January instalment of the principal and interest due the defendant to the amount of the interest on the Haggard contract, and one-sixth of the principal thereof, unless the evidence shows that the defendant Case agreed to take it and apply it to the January instalment due him. In the absence of any agreement of the parties to the contrary, the law would apply the different instalments of the Haggard and Fleming contracts as they matured to the different and corresponding instalments of the contract between the plaintiff and the defendant as they matured."

The court refused each of these five instructions, and the defendant took exceptions.

Thereupon the court gave the following instructions:

"1. First, as to the forfeiture of the contract as between Case and Wolcott as declared by Case. The contract required that before such forfeiture could be declared, thirty days previous notice to Wolcott, his heirs or assigns, demanding a fulfilment of the contract and specifying such feature or features as it is deemed have not been complied with, should be given.

"The court instructs you that the letter in evidence dated the 4th day of January, 1858, does not contain such specifications of non-compliance with the contract, or of the intention of Case to declare the contract forfeited, as would justify Case in declaring said contract forfeited. Nor does the letter of Case, dated New York, January 10th, 1858, to Wolcott, given in evidence, authorize the declaring of such contract forfeited; if you find the same was declared forfeited on the 5th of February, 1858, and if there is no other evidence of notice to Wolcott by Case declaring such contract forfeited on the 5th of February, 1858, than the before mentioned letters, then any declaration of Case that said contract was forfeited is illegal and void.

"2. If the jury find that the defendant, without giving the proper notice required by his contract with Wolcott,

declared said contract forfeited, and placed the same upon the records of the recorder's office of the county in which said lands are situated, and circulated and published the same in the community in which they are located, and proceeded himself to sell and dispose of a large portion of the same, thereby preventing Wolcott from proceeding in the execution of his part of the contract, in such case the plaintiff is entitled to recover the value of the land over the price he was to pay for the same, at the time of so declaring the same forfeited."

To the giving of each of these instructions the defendant excepted.

The jury returned a general verdict for the plaintiff, accompanied by answers to interrogatories propounded to them by the court, as follows:

1. "Did the plaintiff and defendant, Case, make the contract of August 20th, 1856, in reference to the sale of lands, of which a copy is filed with the complaint?"

Answer. "Yes."

2. "Did the plaintiff ever make a payment in money on said contract, except the instalment of interest thereon, which fell due in January, 1857?"

Answer. "No."

3. "Did the plaintiff pay any taxes on said lands?"

Answer. "No."

4. "Did the plaintiff, in the year 1856, procure the defendant, Case, to make a deed for 199.77 acres of said lands to John Fleming, for which the bond of said Fleming was made to said Case, and secured by a mortgage on the lands so sold, to the amount of one thousand dollars payable in six equal annual instalments, with annual interest, the first to be paid January 1st, 1858?"

Answer. "Yes."

5. "Were the said bond and mortgage of Fleming delivered to and accepted by the defendant, Case, in the month of May, 1857, for the purpose of being applied as a pay-

ment on the lands, under and in pursuance of the terms of the contract between the parties of August 20th, 1856?"

Answer. "Yes."

6. "Did the plaintiff assign the contract between himself and George W. Haggard, which is filed with the answer, to the defendant, on the 19th day of December, 1857?"

Answer. "Yes."

7. "Did the defendant, Case, at the time he took the assignment of said Haggard contract, have any knowledge of the solvency of said Haggard, and his ability to pay the money contracted to be paid?"

Answer. "None, except by the representations of plaintiff."

8. "Did the said plaintiff, at the time he made the assignment of the Haggard contract, represent to and assure the defendant that said Haggard was responsible and able to meet his obligations?"

Answer. "Yes."

9. "Was it a fact that said defendant, Case, at the time he took said Haggard contract, consented to do so only upon the representations of said plaintiff that said Haggard was responsible and able to meet his obligations, and with the agreement with plaintiff that he (Case) should investigate the circumstances of Haggard, and if he was ascertained not to be responsible, or should make default in the payment of the principal and interest to become due in January, 1858, that the said Haggard contract should not operate as a payment on the contract of August 20th, 1856?"

Answer. "No."

10. "Was said Haggard, in the months of November and December, 1857, and January, 1858, insolvent and unable to pay the instalments of principal and interest of his contract, which became due in January, 1858?"

Answer. "No, not so proven."

11. "Did said Haggard ever make any payment to said Case on the contract assigned to the defendant, Case?"

Answer. "No."

12. "Did said plaintiff, at the time he assigned the Haggard contract, know that said Haggard was insolvent and unable to meet the obligations therein?"

Answer. "No."

13. "Was there any agreement on the part of said Case, after August 20th, 1856, with the plaintiff, to accept said Haggard contract as a payment on the contract of August 20th, 1856, and have the application made farther than the instalments of the Haggard contract should mature?"

Answer. "No."

Motions for judgment on the special findings, and for a new trial, were made by the appellant, and overruled.

A question is made and argued as to the true construction of the contract.

The construction contended for by the appellant is embodied in the fifth instruction asked by him, and refused by the court.

Another, and, to say the least, a very plausible construction, is, that the bonds and mortgages were to be received by Case in payment, and that the clause in relation to not extending the time of payment beyond six annual instalments referred to and controlled the kind of bonds to be taken in the sales of the land by Wolcott.

But under the view we take of the case, this question becomes immaterial.

By the terms of the contract, Case could not avail himself of a forfeiture for a non-compliance with its provisions, until after giving "thirty days previous notice to Wolcott, demanding a fulfilment and specifying such feature or features as it was deemed had not been complied with."

A compliance with the contract by Wolcott at any time within the thirty days after such notice would have been such a performance of its conditions as would undoubtedly have secured to him his legal as well as his equitable rights under it. Any other construction of the contract would make this stipulation as to notice meaningless.

Then the matter stands thus: whilst the contract was in

full force, the appellant, by declaring it forfeited, put it out of the power of the appellee to carry it out according to its terms. In such a case, as we understand the law, the plaintiff is not bound, before he can maintain an action, to perform, or offer to perform. He may have his remedy for being prevented. *Goodman* v. *Pocock*, 15 Ad. & E., N. S., 576. It would clearly be against right to allow the defendant to take advantage of his own wrong.

It is claimed in argument that the whole theory of the plaintiff's case was, that he had fully complied, and the defendant was in default. We do not so understand the complaint. It is true, the plaintiff avers performance up to and including the payments falling due in January, 1858, but there is no allegation of any further performance. The material facts are all alleged, and under the code the plaintiff is entitled to whatever relief the law gives under the facts properly in proof.

The court properly instructed the jury as to the legal effect of the letters in evidence, of the 4th and 10th of January, 1858.

The provision of the contract, that the notice demanding a fulfilment thereof should specify such feature or features as it was deemed had not been complied with, was clearly for the benefit of Wolcott. The object was, that before any forfeiture could occur the appellee should be fully advised of the nature of the thing required of him. It might be, as, in fact, it turned out, that differences of opinion might arise as to the legal effect of some one or more of the provisions of the contract; in such an event, it was of importance to Wolcott to know just what was demanded of him, so as to afford him an opportunity to judge of the matter, in view of the fatal consequences of a misjudgment.

The principal thing complained of in these letters was the failure of George W. Haggard to pay the sum falling due from him in that month. The jury found that Case received this claim from Wolcott under the contract in suit. Whatever construction may be given to that contract, as to

the manner in which such payments were to be applied, clearly the default of Haggard was not the default of Wolcott.

The letters in question are defective as notices under the contract, for not specifying the feature or features deemed not to have been complied with, and for not giving notice of the obligee's election to declare the contract forfeited in the event of non-performance within the thirty days.

It is a general principle, that a provision in a contract for a forfeiture, to avail the party claiming the benefit of it, must be strictly complied with. Wolcott clearly had a right to know, from the notice itself, that Case had elected to declare the contract forfeited unless the former complied with the demand. Wolcott had incurred a large expense in carrying out the contract; he had made the first payment; under such circumstances Case ought at least to be held to good faith. It is clear to our minds that Case was trying to get rid of a disadvantageous contract.

The instructions asked were properly refused, not being applicable to the case made by facts in proof. The instructions given were pointed, and a clear exposition of the law of the case.

It is claimed that the damages are excessive; that the most to which Wolcott is entitled under the facts is the money paid and expended by him with interest. It will be noticed that there had been no improvements made on the lands by Wolcott except such as were contemplated by the contract itself. Case by his own wrongful act, after part performance, had put it out of the power of Wolcott to comply with its provisions. In such a case, we think that the measure of damages is the difference between the unpaid purchase-money and the actual value of the lands at the time of the breach. This would be placing the parties in the condition they were in at the time, leaving Wolcott to employ his means in other speculations. The only objection to the fairness of this rule is the fact that Wolcott had at the time already expended some three thousand dollars in the performance of the contract; but clearly the

rule of damages recognized and acted upon by the court below worked no injustice to the appellant. *Hopkins* v. *Lee*, 6 Wheat. 109, is very much in point. It is true, that the breach in that case was a failure to convey, but the principle is the same. In the case at bar, the defendant, by his own voluntary act, put an end to the performance, and thereby deprived Wolcott of all benefit of his contract. It is argued, that Case acted in good faith, and therefore he ought not to answer to Wolcott for the prospective profits to arise out of the contract. We have already seen that the former, in violation of his agreement, proceeded to declare the contract forfeited, thereby slandering the appellee's title and preventing the latter from proceeding with its execution. In such a case, it cannot with any fairness be said that the appellant acted in good faith; he was at least seeking an advantage to which he was not entitled.

There is nothing in the special findings inconsistent with the general verdict for the plaintiff.

The point made is, that the special findings show that Wolcott did not perform his contract, and therefore, as a matter of law, is not entitled to recover in this action. This position is answered by the views already expressed in this opinion. The court committed no error in overruling the motions of the appellant for a judgment on the special findings and for a new trial.

Sustaining the demurrer to the fourth paragraph of the defendants answer did not injure him. The facts set up in that paragraph were admissible in evidence under the third.

Judgment affirmed, with costs.

H. W. Chase and *J. A. Wilstach*, for appellant.

J. A. Stein, *Z. Baird*, and *A. Wolcott*, for appellee.

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Morgan and Others *v.* Woods.

Process.—*Publication.*—*Name.*—*Collateral Proceeding.*—*Attachment.*—The in-

troduction of a wrong initial letter between the Christian name and the surname of a plaintiff in the publication of notice of the pendency of a proceeding in attachment in a court of superior jurisdiction the introductory steps authorizing the publication having been properly taken, does not render the subsequent proceedings under such notice void, but simply erroneous; and until reversed by an appellate court, the judgment and proceedings under it are effective and conclusive between the parties.

SAME.—*Date of Term.*—Such a notice by publication stated that the term of court was to be held "on the third Monday of August, 1867."

Held, that the fact that the time of holding the court was fixed by law made this error of date unimportant.

APPEAL from the Gibson Circuit Court.

RAY, J.—This was an action brought by Ephraim E. Woods against appellants, upon a complaint in two paragraphs.

The first paragraph charges, that the defendants have possession of certain property (of which a schedule is filed, marked exhibit "A"), without right, and unlawfully detain the same from the plaintiff.

The second paragraph charges, that the defendants unlawfully, without leave, wrongfully took certain property of the plaintiff, being the same property described in said exhibit "A," and sold the same and converted the proceeds to their own use.

The defendants filed their answer, which we here set out in full.

"Par. 1st. The said defendants, except Hiram E. Read, for answer to the plaintiff's complaint, deny each and every allegation therein contained.

"Par. 2d. The said defendants, except Hiram E. Read, for further answer to the first and second paragraphs of the plaintiff's complaint, say that the personal property mentioned and described in the said two paragraphs is the same and identical property that, on the 2d day of June, 1867, the said defendants, John H. Morgan, William W. Morgan, Hiram E. Read, and John B. Putnam, brought an action in the court of common pleas, of the county of Gibson, against one Sylvester M. Newman (a copy of the complaint in said action is herewith filed, marked 'exhibit A'); and at the same time they made their affidavit in said ac-

tion, for a writ of attachment (a copy whereof is herewith filed, marked 'exhibit B'); and at the same time they filed their undertaking (a copy whereof is herewith filed, marked 'exhibit C'); and thereupon a writ of attachment was issued by the clerk of said common pleas court (of which a copy and of the return thereof are filed herewith, marked 'exhibit D'); and afterwards publication was duly made of the pendency of said action (a copy whereof is herewith filed, marked 'exhibit E'); and on said 2d day of June, 1867, the said plaintiffs in said action, in the common pleas court also made and filed their affidavit in garnishment (a copy whereof is herewith filed, marked, 'exhibit F'); and in pursuance of said affidavit in garnishment, the clerk of said common pleas court issued on said day a writ of garnishment (a copy whereof, with the return thereto, is herewith filed, marked 'exhibt G'), which said writ of garnishment was served on the said garnishee, John P. Newman, on the 29th day of June, 1867, as appears by the return thereto; and afterwards, to wit, at the August term 1867, of said common pleas court, the said cause of Morgan and others *v.* Sylvester M. Newman came on for hearing, and the said John P. Newman, garnishee, filed his answer therein (a copy whereof is herewith filed, marked 'exhibit H'), and the issue being joined upon the affidavit in garnishment and answer of said garnishee, the said cause came on for trial in said court, and such proceedings were had that said court rendered judgment (a copy whereof is herewith filed, marked 'exhibit I'), and in pursuance of said judgment, the clerk issued an order to the said defendant Vail, who was then and there the sheriff of said county, (a copy whereof, with his return thereto, is herewith filed, marked 'exhibit K,') and in pursuance of said order, the said defendant Vail, as sheriff, as aforesaid, levied upon and took into his possession the said property therein described, which is the identical property described in said complaint, and sold the same to satisfy the said judgment, all of which will appear by his return aforesaid to said order of sale;

and these defendants say that the grievances set forth in the said complaint are the identical transactions in the answer described and set forth; and these defendants say that after the issuing of the said writ of garnishment, the said John P. Newman, garnishee as aforesaid, fraudulently and for the fraudulent purpose of cheating, hindering, and delaying the said plaintiffs in said action in the common pleas court, in the collection of their debt against Sylvester M. Newman, made a pretended sale of said goods and chattels to the said plaintiff, which is all the pretense of title that the plaintiff has to the said property; wherefore they ask judgment for their costs."

The exhibits in this answer disclose that the notice of the pendency of the action was in the name of "John M. Morgan *et al.*", in place of John H. Morgan *et al.*, and that the term of the court was to be held "on the third Monday of August, 1887." The error in the time of the holding of the court is not pressed and is not important, as this date is fixed by law, which is sufficient notice of the time.

The judgment, to which reference is made in the answer, shows the finding of the jury against John P. Newman, garnishee, and the usual judgment, the order of sale, and the return of the sheriff. The plaintiff filed his demurrer to the second paragraph of the answer, which was sustained by the court, and exception was taken by the defendants. There was a trial by jury, upon the general issue filed by defendants; finding for plaintiff. Motion for new trial by defendants overruled, and exception; judgment for appellee for $852.80; appeal prayed to this court, bill of exceptions and bond filed. The final order is set out.

The bill of exceptions is made a part of the record.

The appellee, Ephraim E. Woods, testified, that on the 22d day of August, 1867, he was the owner of the property described in the exhibit filed with his complaint; that he had bought the goods on the 20th day of August, 1867, from John P. Newman, and completed the contract on the

22d day of August, 1867, and the defendant Vail had levied on, and taken them on the 23d day of August, 1867.

Other witnesses testified to the value of the goods, and that they were bought by Woods from John P. Newman.

The defendant Vail testified, that he took the goods as sheriff, on a writ in favor of Morgan, Read & Co. (the defendants).

The plaintiff proved the names of the members of the firm of Morgan, Read & Co., and rested.

The defendants then offered in evidence all the papers, including the publication of notice and affidavit of same, in the case of John H. Morgan, William W. Morgan, Hiram E. Read, John B. Putnam, against Sylvester M. Newman and John P. Newman, garnishee, in the court of common pleas of Gibson county, at its August term, 1867; also, the record, writ, and every other paper appertaining to the case, the plaintiff having first admitted that the papers so offered were the original papers which they purported to be, waiving any objection for want of proof that they were the papers aforesaid. All the papers above referred to, and set out with the answer, are set out in the bill of exceptions at length. This evidence was rejected and exception taken. The affidavit of publication made by the printer is set out. It is in the usual form and shows that the publication of the notice of pendency of the action was made in the proper paper three weeks successively—the first publication being on the 29th day of June, 1867, and the last on the 20th day of July, 1867.

As the answer in denial would admit all the evidence proper under the second paragraph, no harm resulted in sustaining a demurrer to that paragraph of the answer.

The only question for our consideration remaining is, whether the error in the introduction of a wrong letter between the Christian and surname of one of the plaintiffs in the notice of the pendency of the action in attachment, rendered the judgment obtained, and the order of sale under it, and the subsequent proceedings, void, or whether

the proceedings undersuch a notice were simply erroneous, and while liable to reversal in an appellate court, good until thus questioned.

While unable to reach a unanimous conclusion, the majority of the members of this court are satisfied that the latter is the correct view, and that until reversed, the judgment and the proceedings under it are effective and conclusive between the parties, and the record thereof should have been admitted in evidence.

This result is not reached by the unreasonable *ipse dixit*, that this letter, thus inserted, constitutes no part of the name, but upon the ground that "where publication has been authorized, the presumption is conclusive that it has been as effectual as service would have been, and if there be sufficient in the notice to inform the party of the nature of the proceedings, the interest he has in it, and the court where it will be heard, we may perhaps regard the subsequent proceedings of the court of superior jurisdiction in which the cause is tried as erroneous, but we cannot treat them as void." *Waltz* v. *Borroway*, 25 Ind. 380.

Here the introductory steps were duly taken authorizing the publication. It became then as effective as the personal service of such a notice or summons. Could the defendant in an action disregard the service because "John M. Morgan" was inserted as plaintiff, in place of "John H. Morgan?" In *Hollingsworth* v. *Barbour*, 4 Pet. 466, it is said, "where there has been personal service of irregular or erroneous process, the party has notice in part and may, if he will, appear and object to or waive the irregularity."

If in this attachment case the defendant had appeared, he would have been informed by the complaint, the affidavit, and the bond, that it was John H. Morgan and others who were endeavoring to obtain a judgment and order for the sale of certain property. *Keene* v. *Meade*, 3 Pet. 1. He had notice in part and might appear and object to the error in the notice, or waive it and defend on the merits. In *Bowen* v. *Mulford*, 5 Halst. 230, it is held, that where a sum-

mons is issued in the name of J. M. plaintiff, and in the state of the demand a middle letter is inserted (J. S. M.), and the defendant does not appear, but judgment is rendered against him in his absence, the judgment will be reversed as erroneous. The reason assigned is, that otherwise the defendant would be required "to accomplish an unreasonable, if not an insuperable, task in sustaining a plea of former recovery; for by which of the persons is the recovery had? he whose name is entered on the justice's docket, or he who is named in the state of demand?" Clearly, in the case under consideration, there could be no such reason assigned for declaring the judgment even erroneous. The papers upon which the publication is based clearly point out the error as a clerical one, and correct it in the proceedings, and upon an examination in response to the notice, the defendant would be correctly informed by the papers filed of the persons who had instituted the proceedings. *M'Gee* v. *Barber*, 14 Pick. 212.

In *Herf* v. *Shulze*, 10 Ohio, 263, it was held, that where a *capias ad respondendum* was issued in the initial letters of the plaintiff's Christian name, the defect might be taken advantage of by plea in abatement, or by motion to discharge on common bail. Such, indeed, seems to be the current of authority, all holding such an obligation to be simply cause for reversal on appeal, where judgment had been taken on default or over the proper exceptions on an appearance.

The cause is reversed for the error in refusing to admit the transcript of the judgment and proceedings under the same in evidence, and remanded for further proceedings.

Frazer, J., dissented.

C. Denby and *A. C. Donald*, for appellants.

C. E. Marsh, for appellee.

ROMIG *v.* THE CITY OF LAFAYETTE.

CITY.—*Street Improvement.—Precept.—Appeal.*—On an appeal from a precept issued for the collection of an assessment for a street improvement in a city incorporated under the general act of 1867, it is a sufficient answer, that at the date of the estimate on which such precept was issued the person taking the appeal owned, and has since owned, only a portion of the lot against which the precept is directed, which portion does not adjoin the street improved.

SAME.—Where an assessment for a street improvement has been made upon a lot as being owned by two persons jointly, an answer on an appeal by one of such persons from a precept issued for the collection of such assessment, alleging that said persons were, at the date of the estimate, and still are, owners in severalty of distinct parts of the lot, presents a good defense.

APPEAL from the Tippecanoe Common Pleas.

On the 22d day of April, 1867, the common council of the city of Lafayette, by a vote of over two-thirds of all its members, adopted an order for the improvement of Fifth street in said city, by grading, graveling, guttering, &c., from Romig street to Maiden Lane. On the 1st of July, 1867, the work was contracted to John R. O'Mara. The east end of lot fifty-nine, in Romig's addition to the city, bounds, or fronts, fifty feet on that part of Fifth street so contracted to be improved. The work was completed according to contract, and a final estimate was made thereof, by the city engineer, on the 25th of November, 1867.

Lot fifty-nine was assessed under the contract, as belonging to Solomon Romig and John Smith, with one hundred and twenty-seven dollars and eighty-eight cents. On the 23d of December, 1867, on the filing of an affidavit by O'Mara that the whole amount so assessed against Romig and Smith, as the owners of said lot fifty-nine, was due and unpaid, the city council ordered that a precept be issued to the city treasurer, commanding him to make said sum by a sale of said lot; and on the day following a precept was issued to the city treasurer, pursuant to said order. From

the precept so issued Romig appealed and filed an answer in the common pleas in two paragraphs.

The first is a general denial. The second alleges, that on the 1st day of April, 1852, the New Albany and Salem Railroad Company, with the permission and consent of said city, located the bed and track of their railroad through said city, and in so doing passed over said lot fifty-nine, and appropriated, in accordance with law, the following portion thereof, to wit: "Beginning fifty feet west of the south-east corner of said lot, on the south line thereof, running thence north-east to the north line of said lot, forty feet west of the north-east corner of said lot, thence west on said lot twenty feet, thence south-west to the south line of said lot seventy feet west of the south-east corner of said lot, thence east on said south line to the place of beginning, containing a strip twenty feet wide across said lot as aforesaid; that said railroad company in constructing their road-bed, excavated and dug out the road-bed to the depth of ten feet, making a steep bluff bank on either side of said road, so that there is no means of passing from that portion of said lot west of said railroad and bordering on said Fifth street the entire width of said lot; and that said railroad has ever since said location, and does yet own and occupy said part of said lot so taken by them for their road-bed and track; and that one John Smith, on the 27th day of April, A. D. 1867, was and still is the owner of all that portion of said lot east of said railroad, and bordering the entire width of said lot on said Fifth street; and that this defendant, is now, and was long before the location of said railroad, and the said purchase of the said John Smith of said portion of said lot so owned by him, the owner of that portion of said lot west of said railroad, no part of which borders on, or is accessible to or from said Fifth street, and is separated from said Fifth street by said part of said lot owned by said John Smith and said part of said lot owned by said railroad, and the only means of access to, or egress from, said parts of said lot owned by this defendant is by

the alley on the rear and west end of said lot; and the said improvement of said Fifth street is of no benefit or advantage in any way to that part of said lot so owned by this defendant. Wherefore, he says that said plaintiff has no right to assess said part of said lot so owned by this defendant, for said improvement, or sell it to pay the same."

A demurrer was sustained to the second paragraph of the answer, to which Romig excepted.

There was a trial by the court, which resulted in a finding and judgment, that the whole of the lot was liable to be sold to pay the amount of said assessment, interest, and costs; but the court ordered that so much of said lot as lies east of the railroad should be first sold, and if it failed to sell for the amount required, then that part occupied by the railroad should be next sold; and if a deficit still remained it should be made by a sale of the remainder of the lot, owned by Romig.

ELLIOTT, J.—The only question in the case arises on the ruling of the court in sustaining the demurrer to the second paragraph of the appellant's answer.

The 69th section of the act of 1867, for the incorporation of cities, (Acts 1867, p. 66) provides, that "the owners of lots bordering on such streets or alleys, or the part thereof to be improved, shall be liable to the contractors for their proportion of the costs, in the ratio of the first (front) line of lots owned by them to the whole improved line," &c.

In the case of *The City of New Albany* v. *Cook*, 29 Ind. 220, a lot, bordering on that part of the street improved, had been subdivided before the order for the improvement was made, and the subdivisions were owned by different persons. No part of one of the subdivisions bordered on the street improved. And it was held, after a careful consideration of the question, that the owner of the subdivision bordering on the street was alone liable for the assessment. That decision was made under the act of 1865; but

the 69th section of the act of 1867 is a literal copy of section 66 of the former act. See Acts 1865, Spec. Sess., p. 30.

But it is insisted on the part of the appellee, that the appellant was the owner of the whole lot on the 22d of April, 1867, when the order for the improvement was made, and that the fact that Smith became the owner of all that part of it bordering on the street and extending back to the railroad, on the 27th of April, 1867, did not exempt the residue of the lot from liability for the improvement; and reference is made to section 71 of the act of 1867.

It will be observed that the second paragraph of the answer does not allege, or admit, that the appellant was the owner of that part of the lot between the street and the railroad at the time the order was made for the improvement. It alleges that Smith was the owner of that part of the lot on the 27th of April, 1867, and still is such owner; but whether he became the owner on the day named, or before that time, does not appear; nor can it be inferred from the allegation that he purchased it of the appellant. But aside from this, and assuming that the appellant was the owner of the whole lot until the 27th of April, 1867, and that he then sold all that part of it bordering on the street and extending back to the railroad, and how stands the question?

The 71st section of the act of 1867, referred to by the appellant, after providing for an appeal from the precept in such cases, proceeds thus: "If no such appeal shall have been taken aforesaid, then it shall be the duty of such treasurer, within ten days after the expiration of said twenty days, to lay said precept upon the lot or land therein described, and to sell the same, or so much thereof as may be necessary to pay such assessments with costs and charges; but before any such sale, he shall give notice of the time and place thereof by advertising the same for three weeks successively in a newspaper printed and published nearest to such lot or land, if any such be printed and published within the

county wherein such city is situated, and by posting up written or printed notices thereof in at least three public places in said city, and every such sale shall be by public auction, and upon or near the premises, or in the city court rooms of said city, in the discretion of said treasurer, and no sale of said lot or land previous or subsequent to the date of such estimates, and subsequent to the date of such petition, or determination of the common council to make such improvement without petition, shall invalidate or affect any sale thereof in pursuance of this act."

We do not understand this provision as fixing the liability for such assessments upon those who may own the lots, or parts thereof, bordering on the improvement, at the date of the petition, or order of the common council for such improvement, or as creating a lien from that time upon the entire lot for the assessment, if the whole should then be owned by the same person.

The contractor, in whose favor the estimate is made, has no interest in the matter until he contracts to make the improvement, and it would seem absurd to suppose that it was intended to create a lien in his favor before he could have any interest in the subject-matter, or had assumed any liability whatever. There might be propriety in providing that no change in the ownership of a lot bordering on the improvement, or of any part thereof, after the work is let, should lessen the security of the contractor for the payment of the assessments.

But we do not think the provision cited has any relation to the subject of such liens.

Section 70 provides for estimates from time to time as the work progresses, and the payment thereof to the contractor by those liable therefor, and declares that such estimates shall be a lien upon the ground upon which they are assessed to the same extent that taxes are a lien. The assessments are required to be made against the owners severally, in proportion to the number of front feet owned by each bordering on the improvement; and then it is provided

by section 71 that if any owner against whom an assessment is made shall fail to pay the same for the space of twenty days after the date of the estimate, a precept shall be ordered, on the affidavit of the contractor, to enforce the payment thereof by a levy and sale of the lot or ground on which the assessment is made. The precept is required to state the name of the person against whom the assessment is made, the description of the lot or land on which it is made, the amount of such assessment, and the date of the estimate. An appeal is then authorized by the owner of the property, from the precept, to the court of common pleas, but if an appeal is not taken within the time limited, or the assessment paid, the treasurer is required to proceed and sell the property, and then follows the provision relied on by the appellee. The section makes an ample provision for the litigation of all questions arising in the case subsequent to the date of the contract, by a party whose lot or land is assessed, by an appeal from the precept; but if such appeal is not taken, and the property is sold, then it is declared by the clause referred to, that the purchaser's title shall not be invalidated or affected by any sale of the property by the owner after the date when the improvement is determined upon. This is not a question arising after a sale, but upon appeal before sale, and the provision referred to has no application to it.

An objection is urged to the sufficiency of the transcript—which, under the statute, occupies the relation of a complaint—on the ground that it shows that the assessment on the lot was made jointly against the appellant and Smith, instead of a separate assessment against each. This question is not presented upon the face of the transcript, and is not therefore reached by the demurrer or by an assignment of error. The assessment is made upon the whole lot as being owned by the appellant and Smith. This must be understood as asserting a joint ownership, as tenants in common, and if so, the assessment would be properly made against the owners jointly. The answer however avers that

they were owners in severalty of distinct parts of the lot, and would be good for that reason alone.

We think the court erred in sustaining the demurrer, and the judgment must therefore be reversed.

Judgment reversed, with costs, and the cause remanded, with directions to the court below to overrule the demurrer to the second paragraph of the answer, and for further proceedings not inconsistent herewith.

M. Jones, *J. L. Miller*, and *S. T. Stallard*, for appellant.

W. C. L. Taylor, for appellee.

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JAQUA *v.* MONTGOMERY.

PROMISSORY NOTE.—*Suit by Assignee.—Representations of Maker.*—The maker of a promissory note, not governed by the law merchant, made and delivered to the payee, to enable him to negotiate the note, a separate writing, of even date with the note, as follows:

"BEARCREEK TP., Ind., July 28th, 1865.

"This is to show that the note given by me this day to" A. B. "for $75 is all right and will be paid when it comes due." (Signed) C. D.

The note was assigned before maturity to one who was induced to purchase it by reason of said writing, which accompanied it.

Held (ELLIOTT, J., dissenting), in a suit on the note by said assignee against the maker, that the latter might impeach the note for want of consideration and fraud in obtaining it.

SAME.—*Forbearance by Assignee.*—The assignee of a promissory note, not governed by the law merchant, to whom it was assigned before maturity, after it became due agreed to extend the time of payment for a definite period, and did so, upon the promise of the maker that, if the assignee would so forbear, he would pay it at the expiration of such period.

Held (GREGORY, C. J., dissenting), that this promise of the maker constituted a new contract, binding in law, and capable of enforcement, though the maker had a good defense to the note before its assignment.

APPEAL from the Jay Common Pleas.

FRAZER, J.—The court below sustained a demurrer to the second paragraph of the reply, and this ruling we are called upon to review.

One paragraph of the complaint averred, that the defendant, on the 28th of February, 1865, made his promissory note to one Antisdale, payable in one year, which Antisdale assigned to the plaintiff before maturity; that after it became due, the defendant promised the plaintiff to pay the note on the 1st of September, 1866, in consideration that the latter would give day of payment and forbear to sue until that time; that the plaintiff, in consideration of said promise, so agreed and performed his agreement; that the time for payment has passed, and the defendant has failed to pay, &c. The other paragraph was in the common form upon the note. The answer was in three paragraphs. The first and second of these impeached the note for want of consideration and fraud in obtaining it; for reply to which, the plaintiff, by the paragraph to which the demurrer was sustained, averred, that the plaintiff was induced to purchase the note by reason of a writing of even date therewith made by the defendant and delivered to the payee, to enable the latter to negotiate the note, as follows:

"BEARCREEK, TP., Ind., Feb. 28th, 1865.

"This is to show that the note given by me this day to John S. Antisdale for $75 is all right and will be paid when it comes due. (Signed) J. C. MONTGOMERY."

The appellant argues that the defenses pleaded were insufficient, inasmuch as he took the note before its maturity without notice, and cites cases applicable to commercial paper. They are not applicable to this case, the note sued on not being of that class of obligations.

It is further insisted that the fact alleged in the reply constituted an estoppel. It is familiar doctrine, that where the maker of a note represents to one who he knows is about negotiating for the paper, that he has no defense to it, and upon the faith of such assurance the paper is purchased, he will be estopped from making defense. But that is not quite the case before us. The making of a promissory note imports in law a sufficient consideration, and it is a fair inference from its mere existence that the maker

believes that he is liable to pay it, and that he honestly intends to pay it, when he executes it. When such a note is delivered to the payee, the maker puts it in his power to exhibit all this evidence of a valid obligation and real purpose to pay, to the whole world. He is thus enabled often to impose upon an unwary purchaser. And yet in such a case the consideration of the note may be questioned in the hands of an innocent holder. And if to the ordinary terms of the note were superadded an express declaration of what would otherwise be plainly implied, it would hardly increase the currency of the note in the market; and we suppose it would never be held to work an estoppel. We think that no case can be found which carries the doctrine of estoppel to so great an extent. The fact that the assurance is written on a separate paper, though at the same time, should make no difference. The two instruments are as truly a single transaction as if the contents of both had been embodied in one. We have a plain statute allowing the same defenses to a note in the hands of an assignee that could be made as against the payee, and we do not think it should be rendered nugatory by doubtful estoppels. And yet it must be admitted that the difference is not very marked between this case and one where the maker should, an hour after giving the note, innocently assure a person about to purchase it, that he had no defense to it, not supposing that any existed. In the latter case direct authority would probably compel us to apply the doctrine of estoppel, notwithstanding the statement was made in ignorance of the facts, and under the influence of a recent deception which there had been no opportunity to discover. But in the case before us we are not constrained by direct authority, and there is at least these slight differences between this and the case supposed: here the assurance was given at the same instant with the execution of the note, while there it was afterwards; here it was general and to nobody in particular, there it was special and personal to one about to act and who could not but be influenced by it. We have

doubted upon the question before us and considered it much, but a majority now concur in the opinion that there was no estoppel, our brother ELLIOTT dissenting.

But the reply was nevertheless good enough for a bad answer, and hence there was error in sustaining a demurrer to it, if the answer was bad.

One paragraph of the complaint, as we have seen, counted upon a promise, made after the maturity of the note, to pay at a subsequent day in consideration of forbearance, and alleged such forbearance. If this new promise was valid and supported by a sufficient consideration, it constituted a new contract, binding in law and capable of enforcement. It was not a contract forbidden by law or public policy. Had it then a sufficient consideration to support it? Either a benefit to the promisor or an inconvenience to the promisee constitutes a valuable consideration. Upon the maturity of the note, if there was a valid defense to it, the plaintiff, an assignee, had the undoubted right to go, at once, upon the assignor. This was a valuable right, and its surrender or waiver would be a sufficient consideration for the new promise of the defendant. There would be plain injustice in allowing the defendant to attack the validity of the note at the end of the period of additional credit given in consequence of his new promise, and after he had, upon the faith of that promise, led the plaintiff to forego his remedy against the assignor. If he might thus disregard the new promise, he would, without incuring liability, have inflicted upon the plaintiff the injury of delay, to which might also be added ultimate loss, if loss should occur by such delay in pursuing his remedy against the assignor. The majority of the court, GREGORY, C. J., dissenting, concur in the opinion that the first and second paragraphs of the answer were not good defenses to the second paragraph of the complaint, and that the demurrer to the second paragraph of the reply should have been sustained to those paragraphs of the answer.

Judgment reversed, with costs, and cause remanded, with directions to proceed according to this opinion.

ELLIOTT, J.—The first and second paragraphs of the answer are pleaded to the whole complaint, and I fully concur in the opinion by FRAZER, J., that neither of said paragraphs amounts to a good defense to the second paragraph of the complaint. The note was a valid cause of action in the hands of the plaintiff as assignee; it was regular on its face, and imported, *prima facie*, a sufficient consideration to support it. It was not void, though liable to be impeached for fraud or for the want or failure of consideration; and, if, upon its maturity, the defendant had refused to pay it, because of the matters of defense set up in the first and second paragraphs of the answer, the defense, if true, would have been available, under the statute, against the assignee.

But it is alleged in the second paragraph of the complaint, that after the maturity of the note, the defendant, in consideration that the plaintiff would forbear to sue upon it until the first day of September, 1866, promised to pay it to the plaintiff at that time. If the defendant had refused to pay the note at its maturity, and had notified the plaintiff of his defense, the latter would have been at liberty to prosecute an action, immediately, against the defendant and controvert the alleged defense, or he might have proceeded at once against the assignor, and taken upon himself the burden of showing that a suit against the defendant would have been unavailing. By the defendant's promise to pay the note on the 1st of September, 1866, and the agreement of forbearance in consideration of that promise, the plaintiff was delayed in bringing suit, either against the defendant or the assignor, until the expiration of that time. This delay was, of itself, a detriment to the plaintiff, but in addition thereto, he was subject to the risk that the assignor, as well as the maker, might in the meantime become insolvent; and this detriment, inconvenience, and risk, constitu-

ted a sufficient consideration to support the defendant's promise to pay the note at the time agreed upon.

In argument, much stress is laid on the statute, which, in reference to notes of this class, declares that whatever defense or set-off the maker had, before notice of the assignment, against an assignor, or against the original payee, he shall also have against their assignees; but it must be remembered that here the second paragraph of the complaint is based on a promise made by the maker to the assignee, which is supported by a sufficient consideration, and to this promise the matters set up in the first and second paragraphs of the answer present no defense.

But I cannot concur with my brother judges in the conclusion reached by them, that the matters alleged in the second paragraph of the reply do not constitute a valid estoppel. It is alleged in that paragraph, that the defendant at the time of the execution of the note, and for the purpose of assisting the payee in the negotiation or sale thereof, and to induce its purchase, executed and delivered to the payee the following statement in writing:

"BEARCREEK TP., Ind. Feb. 28th, 1865.

"This is to show that the note given by me this day to James S. Antisdale for $75 is all right and will be paid when it comes due. (Signed) J. C. MONTGOMERY."

It is further averred that said statement accompanied said note at the time the plaintiff purchased it of the payee, and that, relying on said statement, the plaintiff was induced to make the purchase in the belief that the note was given for a valuable consideration, that the defendant had no defense thereto, and would pay it at maturity. It is conceded to be a familiar doctrine, that where the maker of a note represents to any one who he knows is about negotiating for it, that he has no defense to it, and upon the faith of such assurance the paper is purchased, he will be estopped from making defense. It is, to my mind, extremely difficult to draw any well founded distinction, in principle, between such a case and the one under consideration.

The prevention of fraud is the peculiar characteristic of the doctrine of estoppels *in pais*. And hence, when one party by words or acts knowingly induces another, who relies thereon, to act in a material matter of interest, the person inducing such action is estopped from denying the truth of his words or acts, even by the assertion of the truth, when to do so would work a fraud or injury to the other.

Here, it is averred that the writing set forth in the reply was given to the payee of the note to enable him to negotiate it, by inducing some one to become the purchaser. True, it was not addressed to the plaintiff by name, but that fact, it seems to me, does not affect the case.

It was not addressed by name to any other person, by which its application might be limited. It was general in its terms, and should be considered, as it was evidently intended, as being addressed to any one who was willing to purchase the note. It is like a general letter of credit addressed to any one who might deal with the person to whom the credit is given. It was given to induce some one to buy the note, and upon the faith of it the plaintiff became the purchaser. It accomplished the purpose for which it was given, and it would be a fraud upon the plaintiff to permit the defendant now to deny its truth.

It is claimed, however, that as the statement was executed at the same time as the note, which, *prima facie*, imported a valuable consideration, they must be taken together as one instrument, and, in that view, that the written statement amounts to nothing more than the note alone imports. This position does not seem to rest on any solid foundation. No importance can be attached to the fact that the instrument set up in the reply and the note were given at the same time. Suppose the plaintiff had been present at the execution of the note, and had then informed the defendant that he was about to purchase it, and had asked if there was any defense to it, and the defendant in reply thereto had made the statement contained in the writing,

and the plaintiff, relying thereon, had then purchased the note, would it be contended that the defendant would not have been estopped from impeaching its validity? The statement was sent forth with the note to be shown to any one who might be willing to become the purchaser, and whether it was negotiated on the day of its date or at a subsequent time, the defendant, by the writing, said to the purchaser, the note is all right, and will be paid at maturity.

Nor can it be maintained that the writing contains nothing more than the note imports. The note contains a promise to pay the sum named at the time stipulated, and, *prima facie*, it imports in law, that it was given upon a sufficient consideration to support the promise. In other words, under the law, the plaintiff was not required to allege in the complaint, and prove on the trial, the consideration for which the note was given, because, in the absence of a showing to the contrary, the law infers a consideration; but still the defendant would be at liberty to show that it was given without consideration, or set up any other valid defense he might have to it, as to which nothing is implied by the note. But the writing goes much further; in legal effect, it not only admits a valuable consideration, but asserts that the defendant had no defense, whatever, to the note.

It seems to me clear that the reply shows a valid estoppel against the defense set up in the first and second paragraphs of the answer.

Gregory, C. J.—As stated in the opinion of the majority, I do not concur in the proposition, that the agreement of forbearance charged in the second paragraph of the complaint, renders the answer impeaching the consideration of the note bad on demurrer. If the note was *nudum pactum*, then the agreement of forbearance was without any consideration to support it. This proposition as between the maker and payee will hardly be disputed. A new promise made in consideration of a previous obligation entered into

without any consideration, is not binding on the promisor, even where the obligation is surrendered at the time. *Copp* v. *Sawyer*, 6 N. H. 386; *Hill* v. *Buckminster*, 5 Pick. 391.

But it is claimed that this rule is not applicable as between the assignee and maker of the promisory note in suit. This note is governed by the statute, which provides that "whatever defense or set-off the maker of any such instrument had, before notice of assignment, against an assignor, or against the original payee, he shall have also against their assignees." 1 G. & H. 448, sec. 3. In relation to this kind of paper, the assignee stands in the place of the payee as to every defense existing at the time of notice of the assignment. It is said that this promise to pay the note at the expiration of the time stipulated is binding on the maker for the reason that the assignee surrendered his right of action against his assignor and thereby suffered detriment. Can this proposition be maintained? I think clearly it cannot. The indorser of a note, under our statute, warrants two things: first, that the note is valid and the maker liable to pay it; secondly, that the maker of the note is solvent and able to pay it. *Howell* v. *Wilson*, 2 Blackf. 418.

The indorsee of a note, obtained from the maker without consideration, has a right, as soon as he discovers the imposition, to sue the indorser for having assigned him a note which the maker is not liable to pay. *Id.* The warranty as to the validity of the note is broken at the time it is made. The note is not valid.

Now all that can be claimed for the appellant is, that he relied upon the promise of the appellee and did not (as he might have done) sue the indorser. But the appellant was not legally bound to wait, and his doing so was voluntary on his part, without the consent of the appellee. Indeed, for aught that appears in the pleadings, the appellant may have successfully pursued his remedy against his indorser. There is no averment in the complaint on the subject, and certainly there can be no legal presumption that the appel-

lant refrained from doing that which he had a legal right to do. The assignee was in privity with the assignor; the maker, as to them, was antagonistic. It could not, in any legal sense, be said, that the maker was negotiating for and on behalf of the payee of the note; the former had no interest in the question of liability as between the assignee and assignor. The rule as to valuable considerations is very carefully and accurately stated by Mr. CHITTY and by Judge BOUVIER in his Law Dictionary. The latter states the rule thus: "Valuable considerations are those which confer some benefit upon the party by whom the promise is made, or upon a third party at his instance or request; or from which some detriment is sustained, at the instance of the party promising, by the party in whose favor the promise is made." See title CONSIDERATION, 1 Bou. L. D. 329.

Mr. CHITTY states the rule thus: "The general rule as to the sufficiency of the consideration seems to be, that it may arise either, first, by reason of a benefit resulting to the party promising, or to a third person, by the act of the promisee; or, secondly, by reason of the latter sustaining any loss or inconvenience, or subjecting himself to any charge or obligation, however small the benefit, charge, or inconvenience may be; provided such act be performed, or inconvenience or charge incurred, with the consent, express or implied, of the promiser, or, in the language of pleading, at his request." Chit. Con. 28.

This court, in *Mathews* v. *Ritenour*, 31 Ind. 31, recognizes the rule as stated by Judge BOUVIER.

It is true, that in *Pierce* v. *Goldsberry*, 31 Ind. 52, this court held, ELLIOTT, J., dissenting, that an oral agreement of the principal debtor to pay merely the same interest that the note would have borne if the indulgence had been given voluntarily, is a sufficient consideration for a promise of forbearance for a definite time; but that was a valid note, based upon a valid consideration.

In the case now before us, there was no new con-

sideration; the pleadings show that there was an oral agreement for forbearance for a time fixed.

It is clear to my mind, that if the appellant suffered any detriment in not pursuing his legal remedy against his indorser, it was his own act, and not suffered at the instance of the appellee, and that therefore the promise of the latter to pay the note at the expiration of the time fixed was a *nudum pactum*.

I think the majority are very clearly right on the question of estoppel.

The instrument signed at the time the note was executed has not the first element of an estoppel. It is no more than what the note itself imported on its face. It was obtained by the same fraudulent act that procured the execution of the note. It was a part of the same contract and was as much a part of the note as if it had been incorporated in it. It was a statement upon which the appellant had no right to rely. Indeed, I think that such a paper accompanying an ordinary promissory note should have the effect of exciting suspicion that all was not right. It looks too much like the act of the thief in attempting to cover up his crime.

I think the judgment ought to be affirmed.

J. B. Jaqua, *J. W. Headington*, and *A. Jaqua*, for appellant.

J. N. Templar and *A. M. Templar*, for appellee.

Yount *v.* Turnpaugh and Wife.

Parties.—*Insane Person—Motion in Arrest.*—An insane person can properly appear as a defendant, only by guardian or committee; but where in a suit against a husband and wife to foreclose a mortgage executed by the defendants, the husband at the time of the suit being insane, the wife appeared

and answered in her own right and on behalf of her husband, and the plaintiff, without objecting to the right of the wife to appear and defend for the husband, took issue on such answer and voluntarily went to trial thereon;

Held, that the plaintiff could not raise such objection by motion in arrest of judgment.

JUDGMENT.—*Clerical Error.*—*Supreme Court.*—The judgment in such case directed the recovery of a certain sum by the *defendants*, when it should, in that respect, have been rendered for the husband alone; but no objection was made to the judgment in the lower court.

Held, that the objection could not be raised in the Supreme Court.

APPEAL from the Wells Common Pleas.

The facts necessary to the determination of this case are as follows:

The appellant brought his suit upon two notes, and for a foreclosure of a mortgage given to secure the same. The notes were given for purchase-money of the mortgaged premises. The defendant paid five hundred dollars on the lands, and made some small improvements thereon. At the time of the trial, the defendant was in the Insane Asylum, and his wife appeared to the case, and put in an answer of two paragraphs. She admitted the execution of the notes and mortgage, and answered that she appeared in her own right, and for and in behalf of her insane husband.

In the first paragraph of her answer, she alleges, that at the time the notes and mortgage were executed, her husband was insane, and demands that the notes and mortgage be canceled. In the second paragraph of her answer, she alleges insanity, as in the first paragraph; that her husband paid five hundred dollars at the time of the trade, and that they took possession and made lasting and valuable improvements to the amount of two hundred dollars. That the contract was unconscionable, the land being worth only fifteen hundred dollars, but that her husband agreed to pay twenty-five hundred dollars; that she brings the deed into court and asks that the contract be rescinded, and the notes, mortgage, and deed canceled, and that her husband have a judgment for one thousand dollars, for the money paid on the contract and for the improvements made by

the defendant and his family; that the defendant is confined in the Insane Asylum; and that plaintiff well knew her husband was insane at the time the trade, notes, deed, and mortgage were made and executed.

A demurrer was filed to the second paragraph, and overruled, but no exception was taken to the ruling.

The appellant then replied by a denial of the allegations of the answer.

The cause was tried by a jury, who returned the following verdict:

"We, the jury, find for the defendants, and assess their damages at $545.50."

The plaintiff moved for a new trial for two reasons: 1st. Because the verdict is not sustained by sufficient evidence; 2d. Because the verdict is contrary to law; which motion was overruled. A motion was then made in arrest of judgment, and also overruled. Upon the verdict the court rendered the following judgment:

"It is therefore considered by the court that the said contract heretofore existing between said plaintiff, Abraham Yount, and defendant, John Turnpaugh, be in all things rescinded, and the said deed, mortgage, and notes, declared canceled, and the title in the land described in said mortgage and deed, to wit," &c., "be, and the same is hereby declared to be in the said Abraham Yount; and it is further declared by the court that the defendants do have and recover of and from said plaintiff the sum of $545.50, as found by the jury, and that they recover of the plaintiff their costs in this behalf expended."

ELLIOTT, J.—The only error assigned in the case, upon which the appellant relies for a reversal of the judgment, is, that the court erred in overruling the appellant's motion in arrest of judgment. It is argued in support of the motion, that if Turnpaugh, the husband, was insane and confined in the lunatic asylum at the time of the trial, as alleged in the answer, he could legally appear and plead to

the action only by a committee or guardian properly appointed; that his wife, though herself a party to the suit, could not legally appear and answer for her insane husband; and that the answer filed by her in his behalf and prayer for a rescission of the contract, and also the finding of the jury, and decree of the court thereon, are not binding on him, and therefore erroneous.

The statute confers on the courts having probate jurisdiction, power to appoint guardians for persons of unsound mind, to whom is committed the control and management of the estates of their wards until their restoration to reason. And the same duties are required of, and the same powers granted to, such guardians, so far as the same are applicable, as are required of and granted to guardians of minors. 2 G. & H. 573–4–5.

An insane person can only properly appear as defendant in a suit by guardian or committee. And it was an evident error in the court, in the case under consideration, to permit the wife to appear and defend for her husband. But the question arises, does the appellant, upon the facts in the record, occupy such a position as enables him to avail himself of the error?

It is admitted that, at the time of the trial, Turnpaugh was insane and confined in the lunatic asylum, and yet the appellant made no effort to have a committee or guardian appointed to appear for him; and when his wife appeared and filed an answer in his behalf, her right to do so was not controverted. True, the appellant demurred to the second paragraph of the answer, but as both paragraphs were filed in behalf of the husband, and no objection was urged to the first, it is but reasonable to presume that the objection made to the second related to the sufficiency of the facts alleged to constitute a defense, and not to the right of the wife to answer for her husband. When the demurrer was overruled, no exception was taken to the ruling, but

issue was taken on the answer, and the appellant voluntarily went to trial upon the truth of the matters alleged.

The facts alleged in the answer were sufficient to bar the action, and justify the judgment of the court. The only objection to the answer is that it should have been filed by a committee or guardian of the insane defendant, which, under the facts just stated, we think comes too late.

The court, in the exercise of its chancery powers, might have appointed a guardian *ad litem* to appear for the insane defendant. It however permitted his wife to appear and answer for him, without objection by the appellant, and he cannot be permitted to raise the objection after he is beaten in a trial on the merits.

The judgment, in terms, is for both defendants, and is objected to on the ground that as to the sum recovered, except costs, it should have been for the husband alone. This was doubtless an oversight, or a mere clerical error, but no objection was made to it in the court below, and it cannot avail the appellant to raise it, for the first time, in this court.

The judgment is affirmed, with costs, and ten per cent. damages.

G. H. Voss and *E. A. Davis*, for appellant.

The Jordan Ditching and Draining Association *v.* Wagoner.

Draining Association.—*Assessment.*—Suit by a ditching association, to enforce a lien for benefits assessed to the defendant's land, the assessment on which the suit was founded commencing thus: "A schedule of lands and assessments of *benefits* to same caused by the construction of the ditch contemplated to be constructed by," &c. Appended to the assessment was an affidavit of the appraisers, that the "foregoing is a true and correct assessment of wet lands," &c.

Held, that this sufficiently appeared to be an assessment of *benefits*.

SAME.—*Description of Land.*—The description of the defendant's land in said assessment was by abbreviations and figures, as follows: "Matthias Wagoner S. E. ¼ of N. W. ¼ Sec. 18, T. 21, N. R. 7 E., 40 acres."

Held, that this was a sufficient description.

SAME.—*Complaint.—Description of Drain.*—In such an action the complaint need not contain the articles of association or allege their substance; nor is it necessary for the complaint or assessment to describe the ditch in any manner.

APPEAL from the Madison Common Pleas.

FRAZER, J.—This was a suit by a ditching association, to enforce a lien for benefits assessed against the appellee's lands. The assessment upon which the suit was founded was as follows: "A schedule of lands and assessment of *benefits* to the same caused by the construction of the ditch contemplated to be constructed by the Jordan Ditching and Draining Association, all of which lands are situated in Madison county, and State of Indiana, and appraised by James M. Dehority, Eli Davis, and Charles O. McClade.

* * * * * *

Matthias Wagoner S. E. ¼ of N. W. ¼ Sec. 18, T. 21, N. R. 7 E., 40 acres. - - - - $35.00."

Appended to it was an affidavit of the three persons named as appraisers, that the "foregoing is a true and correct assessment of wet lands," &c.

The court below held this to be insufficient. Two defects are suggested in argument: 1. That the description of the tract of land was insufficient. 2. That it does not appear to be an assessments of benefits. Of the first objection it is sufficient to say that the description would be good in a deed or mortgage, the abbreviations being as well understood in this State as the words for which they stand. The second is sufficiently answered by reading the instrument.

The appellee also suggests that either the complaint, or articles of association, or assessment, should show the beginning and terminus of the ditch. Upon the demurrer to the complaint, which does not, in this case, and need not, contain the articles of association, or allege their substance,

it is hardly proper for this court to express an opinion as to what they should contain. We know of no good reason requiring the complaint or assessment to describe the ditch in any manner. In *West* v. *The Bullskin Prairie Ditching Co.*, 19 Ind. 458, a reason was given for it which will not bear close examination, viz., that the defendant may be able to answer that the drain was not of public utility, or of private benefit to him, if such is the fact. But what is to hinder the defendant from describing the ditch himself? We do not understand that a plaintiff need do more, by his complaint than state facts enough to constitute a cause of action in his favor against the defendant, to be safe from a demurrer for the want of sufficient facts. The assessment is sufficient, *prima facie*, for his purpose, and it is not the office of a complaint to do more than show a cause of action. The defendant must then meet it in his own way, and the law provides him with abundant methods of ascertaining whether or not he has a good defense. It is no more required of a plaintiff that his complaint shall aver matters necessary to enable the defendant to know what defense he ought to make, than it is that he shall furnish the latter the names of witnesses by whom his defense can be proved. Each party is by the rules of pleading left to make his own case upon the record, and is only required to state it with such clearness that his antagonist may know what he has to meet.

Indeed, in some cases expensive surveys must precede the location of the works and determine their description. We know of no law which requires that all this outlay shall occur before the collection of assessments, and before suit can be maintained against persons to be benefitted.

Reversed, with costs, and remanded, with directions to overrule the demurrer to the complaint.

W. R. Pierse and *H. D. Thompson*, for appellant.

J. W. Sansberry, for appellee.

KINGAN and Others *v.* GIBSON.

ACCORD AND SATISFACTION.—A. being liable to B. in a large sum and claiming that C. was liable to him, B. accepted a small sum from A. in full satisfaction, upon the condition, proposed by A., that he would forego the enforcement of his claim against C. Afterwards A. violated the condition and collected his demand from C. by suit.

Held, that A. could not claim that B.'s demand was satisfied.

APPEAL from the Shelby Common Pleas.

FRAZER, J.—The appellee, by reason of his failure to deliver to the appellants, according to contract, certain hogs, which the appellee had purchased of one Oldham, became liable in damages to them to the extent of fifteen hundred dollars. The appellee induced the appellants to take from him, in satisfaction of their damages, upon condition that the appellee would not sue Oldham's estate, a horse worth one hundred and fifty dollars, by falsely and fraudulently representing to them that Oldham had failed to deliver the hogs to the appellee as he had contracted to do; that damages for Oldham's breach of contract could not be collected, Oldham being dead and his estate insolvent; and by promising to make no attempt so to collect damages from Oldham's estate. The appellants were ignorant of the condition of Oldham's estate, and relied and acted upon the representations of the appellee, the latter knowing them to be false. In truth, Oldham's estate was solvent, and the appellee recovered from it twelve hundred dollars for Oldham's breach of contract. The appellants sued, alleging the foregoing facts in their complaint; a demurrer was sustained to it, and that ruling is before us for consideration.

The satisfaction is alleged to have been upon condition that Oldham's estate should not be held liable, and it is averred that this condition has been broken. There is, therefore, no satisfaction, according to the very terms agreed upon by the parties. We suppose that the condition was lawful, and we are not able to conceive of any reason to justify us in disregarding it.

The case may be put shortly thus: A. is liable to B. in a large sum, and claims that C. is liable to him. B. will accept a trifle from A. in full satisfaction, upon condition that A. will forego the enforcement of his claim against C., and it is so agreed, the trifle being paid. A. afterwards violates the condition and collects his demand of C. Now, it seems very plain that A. cannot say that B.'s demand is satisfied.

Reversed, with costs; cause remanded, with directions to overrule the demurrer.

M. M. Ray, J. W. Gordon, W. March, E. B. Martindale, and *F. Knefler*, for appellants.

S. & A. Major, for appellee.

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Dunn and Another *v.* Johnson.

Pleading.—*Evidence.*—*Error Cured.*—Suit on a contract for the delivery by the defendant of a certain number of saw-logs to be sawed by the plaintiff at a stipulated price per hundred feet, the breach alleged being the failure of the defendant to deliver a portion of the logs. Answer, that the defendant delivered a certain number of logs, which the plaintiff sawed in such an unworkmanlike manner that the lumber was worthless, and, the plaintiff refusing to saw properly, the defendant refused to deliver more logs. Reply, the general denial. On the trial, after the defendant had offered evidence tending to sustain said answer by proving that the lumber was bad, the plaintiff offered evidence tending to show that the logs delivered were such that good lumber could not be made from them. This evidence of the plaintiff was rejected until an additional reply alleging the fact had been filed, by leave, over the defendant's objection, when, a demurrer to the additional reply having been overruled, said evidence of the plaintiff was admitted and the trial proceeded, the jury not having been resworn, and the defendant objecting.

Held, that the evidence should have been admitted when first offered under the reply in denial; that the additional reply did not change the issue, and there was no necessity for reswearing the jury; that the demurrer to the additional reply might properly have been sustained, or the paragraph to which it was filed might have been stricken out on motion, or leave to file

it should not have been given; yet that no wrong resulted from these proceedings.

CONTRACT.—*Breach.—Damages.*—A. contracted to saw into lumber for B., at a stipulated price per hundred feet, to be paid at certain periods, a certain number of logs to be furnished by B. at A.'s saw-mill.

Held, in a suit by A. against B. for the failure of the latter to deliver a portion of the logs as agreed, that the fact that the plaintiff sold his saw-mill after he had been notified by the defendant that the latter would pay for no more sawing and deliver no more logs, or that the plaintiff made a sub-contract with a third person to saw the logs that might be delivered, could not affect the right of recovery or the measure of damages.

SAME.—*Measure of Damages.*—On the breach of such an executory contract, without sufficient cause, the measure of damages is the difference between the contract price of the entire work to be done and the reasonable cost of the work, at the ordinary prices, in labor, in wear and tear of machinery, in time of use of machinery, and in value of superintendence. The profits which have been realized by a sub-contract made with a third person to do the work, or which might have been realized by such a sub-contract if made, cannot be taken as evidence of such damages. This rule applies alike to public and private contracts, on a large or small scale. *Jones* v. *Van Patten*, 3 Ind., 107, overruled.

SAME.—*Reduction of Damages.—Burden of Proof.*—In such a case, the burden rests upon the defendant of proving, in reduction of the damages estimated by such rule, that the plaintiff could have procured other work from which profits would have accrued.

APPEAL from the Marion Common Pleas.

RAY, J.—This was a suit upon a written contract brought by the appellee against the appellants, for sawing lumber for them and for a failure to deliver logs to be sawed into lumber, as they had contracted by a written agreement whereby they agreed to furnish at the plaintiff's mill one thousand saw-logs to be sawed by the plaintiff at seventy-five cents per hundred feet, payment for the sawing to be made every two weeks, the plaintiff to pile the defendants' lumber separate from other lumber. This contract bore date on the 3d of January, 1865. The breaches alleged were a failure to pay for lumber sawed as agreed and a failure to deliver a portion of the logs. The suit as tried was compounded of two suits—one commenced on the 26th of January, 1866, and the other on the 25th of May, 1866, which were, on the 28th of June, consolidated by agreement.

The answer was in seven paragraphs. The first was the general denial; second, payment; third, that the plaintiff refused to perform his contract to saw, whereby the defendants were damaged one thousand dollars, which they demand, as and by way of counter-claim; fouth, as to failure to deliver logs, that plaintiff had broken the contract by refusing to saw or let defendants take away their lumber sawed. The fifth paragraph need not be noticed, inasmuch as it has no bearing upon any question here. The sixth paragraph was, that the defendants delivered five hundred logs, which the plaintiff sawed so badly and unworkmanlike that the lumber made was worthless, and the plaintiff refusing to saw properly, the defendants, as they lawfully might, refused to deliver more logs. The seventh need not be noticed. The plaintiff replied by general denial.

On the trial, after the defendants had offered evidence tending to show the unworkmanlike character of the sawing done, by proving that the lumber sawed was bad, the plaintiff offered evidence tending to show that the logs of which the lumber was manufactured were of such a character that good lumber could not be made of them. This evidence was refused until the plaintiff, by leave, over the objection of the defendants, filed an additional paragraph of reply avering the fact, which was unsuccessfully demurred to, and then the evidence was admitted, and the trial went on, the jury not having been resworn, and the defendants objecting. This is urged as an irregularity for which a new trial should have been granted, as was demanded below, and it is also claimed that the demurer should have been sustained. We think not. The evidence ought to have been admitted when first offered. It merely tended to disprove what the defendants were insisting upon—that the lumber was bad because of unskilful sawing. It tended to show another and a different cause for the bad quality of the lumber, and one for which the plaintiff was not responsible. It follows that the additional reply did not change the issue, and was therefore harmless, and that there

was no necessity for reswearing the jury; and that though the demurer might properly have been sustained, or the paragraph stricken out on motion, or leave to file it should not have been given, yet no wrong resulted from the whole of these proceedings. They were steps by which the erroneous refusal of the evidence was corrected. Such seems to have been the final opinion of the presiding judge, when the motion for a new trial gave opportunity for fuller deliberation than was afforded when these various rulings were first made.

The verdict was for the plaintiff, assessing his damages at $886.40, and it appeared by answers of the jury to interrogatories submitted to them that they made up the aggregate of damages thus assessed as follows: balance not paid on lumber sawed $393.50, and $442.90 damages for failure to deliver logs as per contract.

There was evidence showing that before all the logs which the defendants had delivered were sawed, the plaintiff sold his saw-mill to one Pollard and delivered the possession thereof. The contract of sale was in writing and contained the following clause:

"Said Pollard on his part agreeing to finish and wholly complete the contract heretofore entered into between said Johnson, of the one part, and Wood and Foudray, J. W. Browning and Jacob P. Dunn, of the other part, on the 3d day of January, 1865; said Johnson agreeing to pay Pollard for finishing the contract between him and Jacob P. Dunn, in said contract mentioned, and on the same terms and payments therein mentioned; Pollard to look to the remaining parties, Wood, Foudray and Jones, the successor of Dunn and Love, for his payment for finishing and completing said contract."

As the contract to furnish logs was several, we construe this agreement to look to the other parties to refer to the payment for sawing done for them individually under the contract.

This contract was signed on the 6th of February, 1866,

and it provided that Pollard should receive possession of the mill on the following day.

The court instructed the jury, that "the fact that the plaintiff sold his mill after he was notified by the defendants that they would pay for no more sawing and deliver no more logs, or that he made a sub-contract with some other person to saw the logs that might be delivered, cannot affect the right of recovery, or the measure of damages."

It is insisted that this instruction was wrong; that as Johnson was to let Pollard receive the full amount of the contract price for the sawing, no possible profit could have resulted to Johnson, if the contract had been completed and the logs furnished; in other words, that the measure of damages between Johnson and the defendants is to be fixed by the profits he might have realized by a sub-contract with a third party to do the work. But if Pollard had contracted to do the work for half its actual value, it would not seem reasonable to charge the defendants with the consequences of Pollard's folly—to impose upon them a liability for damages which resulted, not from the breach of their contract, but from the shrewdness and skill of the other contracting party in dealing with a third person. Plainly such consequences are not contemplated when parties enter into a contract, which by reason of some misfortune they may be unable to complete; but they consider rather the usual cost of the work for which they contract to pay and regard their liability as limited by the margin between such cost and the contract price. Johnson had no power by any sub-contract he might make with Pollard, either to increase or diminish the damages resulting from a violation by the defendants of their contract. Those damages must be determined alone from, and regulated by, the terms of the contract into which the plaintiff and defendants voluntarily entered.

Independent of authority, it would seem to be a reasonable and just rule, that on the breach of an executory contract like the present, the measure of damages should be

the difference between the contract price of the work to be done and the reasonable cost of the work at the usual and ordinary prices. This rule would be just; for it fixes such damages on the breach of the contract as the parties are presumed to have had in contemplation at the making of it. It would be fixed and certain, and not a sliding scale to be moved at the will of either party; for it is not affected by the subsequent contracts of one party with third persons. It would be equal and uniform, measuring by the same standard the rights of the close and the charitable, the shrewd and the simple.

This rule is approved by reason, and is also established by authority. In the case of *Masterton* v. *The Mayor of Brooklyn*, 7 Hill, 61, decided in the Circuit Court by KENT, and in the Supreme Court by NELSON, C. J., approved in *Story* v. *N. Y. & Harlem, R. R. Co.*, 6 N. Y. 85, and in *Seaton* v. *The Second Municipality*, 3 La. Ann. 44, and quoted with approval by Sedgwick, in his excellent treatise, page 73, the learned Chief Justice says:

"Profits or advantages which are the direct or immediate fruits of the contract between the parties * * * are part and parcel of the contract itself, entering into and constituting a portion of its very elements, something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed, perhaps, the only inducement to the arrangement."

The plaintiffs in that case had a contract with the city authorities of Brooklyn, by which they agreed, for a certain stipulated price, to furnish and deliver marble to build a City Hall in Brooklyn, from Kain & Morgan's quarry in East Chester. They also had made a collateral contract with Kain & Morgan to furnish them the marble at a certain price. It was contended there, as here, that the measure of damages on a breach of the contract by the city authorities, was the difference between the price the plain-

tiffs were to receive from the city of Brooklyn, and the price they were to pay Kain & Morgan. Upon this point the Chief Justice says:

"It will be seen that we have laid altogether out of view the sub-contract of Kain & Morgan, and all others that may have been entered into by the plaintiffs, as preparatory and subsidiary to the fulfilment of the principal one with the defendants. Indeed, I am unable to comprehend how these can be taken into the account, or become the subject matter of consideration at all, in settling the amount of damages to be recovered for a breach of the principal contract. The defendants had no control or participation in the making of the sub-contracts, and are certainly not to be compelled to assume them if improvidently entered into. On the other hand, if they were made so as to secure great advantages to the plaintiffs, surely the defendants are not entitled to the gains which might be realized from them. In any aspect, therefore, these sub-contracts present a most unfit, as well as a most unsatisfactory basis upon which to estimate the real damages and loss occasioned by the default of the defendants."

In the case of *Story* v. *N. Y. & H. R. R. Co.*, 6 N. Y. 85, where the same principle contended for by the appellants in this case had been adopted in ascertaining the damages, the court said:

"This rule of damages was fully considered in the important case of *Masterton* v. *The Mayor, &c., of Brooklyn*, 7 Hill, 61, and held not only to be entirely inadmissible, but that a sub-contract could not be taken into consideration, as an item of evidence in estimating the profits of the principal one. The reasons given by the learned Chief Justice for laying it entirely out of view are full and satisfactory."

Sedgwick, in speaking of the class of contracts to which the one sued on belongs, says:

"It appears to be settled in regard to this class of agree-

ments, that the contractor is entitled to recover the profits he has lost by the default of the other party to the undertaking; that in estimating these profits, his sub-contracts are not to be taken as evidence thereof; but they are to be arrived at by taking the market value at the time of the breach, and if there be no market value, then by a minute inquiry into cost of materials, the expense of transportation, and the amount and value of labor required." Sedgw. Dam. 364.

It seems to us that the instruction given was correct, even if we place out of view the question, whether the notice given by the defendants, that they would pay for no more sawing and furnish no more logs, did not authorize this action by the plaintiff to recover for a violation of the contract, as was ruled in *Morrison* v. *Lovejoy*, 6 Minn. 319.

It is complained that the court below erred in the eighth instruction, which was as follows:

"The rule of damages as to profits, in case you find the defendants committed a breach of the contract without sufficient cause, is, that the plaintiff in such case would be entitled to the reasonable profits he would have made upon the contract if it had been carried out. To ascertain the profits, there should be deducted from the total amount the plaintiff would have received, the cost of doing the work, in labor, in wear and tear of machinery, in time of use of machinery, and value of superintendence, according to the evidence in the case. The balance will be the profits and damages to which the plaintiff would in such case be entitled."

Very closely in point is the case of *Morrison* v. *Lovejoy*, *supra*. Plaintiffs agreed to run and use for manufacturing lumber, exclusively for the defendants, certain mills, situated at Saint Anthony, from the date of the contract till May 15th, 1860, and the defendants agreed to furnish a sufficient quantity of logs to keep said mills in full operation during said period, and to pay plaintiffs at the rate of five dollars per thousand for sawing pine lumber, and seven dollars per

thousand for hard wood. The action was brought to recover an alleged balance, and also damages by reason of defendants refusing to furnish logs to keep said mills in operation.

The case was very fully argued by counsel on both sides, and after a thorough discussion of the authorities the court said:

"When one party to an executory contract like that on which this action is brought refuses further to comply with it on his part, the other party has an immediate cause of action for said breach; and he may sue on it at any time and recover the damages which he may have sustained by being deprived of the benefits accruing to him under it.

"If he treat the contract as ended and sue immediately upon its breach, his damages are to be measured by the value of the contract to him at the time it was broken; and this value is estimated by the profits he would have realized during the continuance of the contract had it been faithfully carried out by the parties. But in estimating the profits which a party under such a contract would realize, allowance must be made for every item of cost and expense necessarily attending a full compliance on his part. If, therefore, the contract is for manufacturing a given article, and mills and machinery are necessarily employed in making it, the reasonable or usual rent, or value of the use of such mills or machinery, enters into the cost of manufacture, and should be taken into consideration in estimating the profits, because the profits are as directly affected by such expenses as by any other."

In the language of *Fox* v. *Harding*, 7 Cush. 516, "if the profits are such as would have accrued and grown out of the contract itself as the direct and immediate fruits of its fulfilment, they form a just and proper item of damages to be recovered against the delinquent party on a breach of the agreement." *Cunningham* v. *Dorsey*, 6 Cal. 19; Mayne on Damages, 16.

But appellants insist that this rule allowing the contractor to recover profits is confined to "parties who undertake

to construct public works on a large scale, such as railroads, canals, or government buildings;" and we are cited to Sedgwick on Damages, 364, as authority for this distinction. But it will be observed that the first illustration of the application of this rule given by the author is a trivial contract between private parties, where a millwright agreed to put machinery into the plaintiff's mill in a good and workmanlike manner, and for his failure he was held liable for such additional sum beyond the cost of repairs as the mill would have been worth to the plaintiff if the defendant had fulfilled his contract, more than it was worth while the machinery was insufficient.

But the law can recognize no distinction between public and private contracts; between the large and the small. To contracts of the same class the same law must be applied.

We are cited to *Jones* v. *Van Patten*, 3 Ind. 107, where it was held, that "the plaintiff should have had such damages as would have placed him in as good a condition at the time the contract was broken as he would have been in had he not made the contract."

In fine, he may be compelled to rescind by the wrongful act of the other party. His contract may have been of great value to him, and yet he is to receive no damages for its violation, no compensation, but simply be placed in the same position as though he had never made the contract, and this for no default on his part. This, in our opinion, never was the law.

But it is urged that the question of damages depends upon the loss of time incurred by the violation of the contract; that if the plaintiff could have procured other work from which profits would have accrued, such profits should have been deducted from his estimated damages.

This is doubtless true, but the matter is with the defendant to prove in reduction of damages. *Costigan* v. *The Mohawk & Hudson R. R. Co.*, 2 Denio, 609. In *Hamilton* v. *McPherson*, 28 N. Y. 72, it is said: "The burden of

proving that the damages which have been sustained in such cases could have been prevented, unquestionably rests upon the party guilty of the breach of contract." The defendants introduced no such proof, but the plaintiff was prepared to perform his contract.

It is objected that the first suit was brought too soon; but the second action, with which it was consolidated, covered the claim included in the first.

It is claimed that the plaintiff violated his contract by a refusal to deliver lumber sawed, on the 18th of January. But the finding of the jury that the sawing of the lumber was not paid for is conclusive on this point.

Judgment affirmed, with one per cent. damages and costs.

N. B. Taylor, *M. M. Ray*, *J. W. Gordon*, *W. March*, and *S. Major*, for appellants.

J. T. Dye and *A. C. Harris*, for appellee.

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Boland *v.* Whitman, Receiver of the Sinnissippi Insurance Company.

Mutual Fire Insurance Company.—*Receiver.*—*Pleading.*—In a suit by a receiver of a mutual fire insurance company, organized under the laws of this State, to recover an assessment on a premium note executed to said company by the defendant, it is not necessary that the complaint should be accompanied by a transcript of the decree appointing the plaintiff receiver of the company and making the assessment sued for.

Same.—*Rescission of Contract of Insurance.*—By agreement between a mutual fire insurance company, acting through its board of directors or an agent duly authorized by them, and the insured, a contract of insurance may be rescinded by the surrender of the policy before the expiration of the time for which it was issued and the release of the insured from further obligation on his premium note.

Same.—*Suit on Premium Note.*—*Ignorance of Law.*—The fact that assessments upon a premium note executed to a mutual fire insurance company have been made more frequently and in greater amounts than the agent of the company, at the time of the execution of the note, represented they would be

to the insured, who confided in such representations and was induced thereby to enter into the contract and execute the note, cannot constitute a defense to a suit on such note.

SAME.—*Fraudulent Representations as to Solvency.*—If at the time of the making of the contract of insurance, the agent, by the authority of the directors, represents that the company is entirely solvent and able to pay all losses and is then worth a certain considerable amount, and the insured relies on such representations and is induced thereby to enter into said contract and execute the premium note, and said representations are false, these facts will constitute a good defense to a suit on said premium note.

SAME.—*Pleading.—Fraud.*—Suit by the receiver of a mutual fire insurance company on a premium note. Answer, that the officers of said company entered into a fraudulent combination with A. and B. and procured the institution by A. and B. of the suit against said company, in which said receiver was appointed and the assessment sued for in this action was made, and by fraud, collusion, improper admissions, and false testimony, procured the decree, assessment, and appointment of the plaintiff in this action as receiver.

Held, that if the defendant could in this collateral manner impeach said decree for fraud, still the answer was bad for failing to allege any material facts constituting fraud.

SAME.—*Change of Ownership of Insured Property.*—Where property insured by a mutual fire insurance company is sold and conveyed by the insured, he is not liable to be assessed on his premium note for losses occurring after such sale and conveyance.

APPEAL from the Lawrence Common Pleas.

This was a suit by Whitman, Receiver of the Sinnissippi Insurance Company, against Boland, on two premium notes, executed by him to said insurance company. The complaint is in two paragraphs. The first is on a premium note executed on the 30th of September, 1864, as follows:

"For value received in policy No. 1623, dated the 30th of September, 1864, issued by the Sinnissippi Insurance Company, I promise to pay the said company the sum of two hundred and forty dollars, in such portions, and at such time or times as the directors of said company may, agreeably to their by-laws and the laws of this State, require to pay the expenses and losses, as prescribed by the laws of this State, without any relief from valuation or appraisement laws."

The second paragraph is on a note for one hundred and twenty dollars, executed on the 22d day of March, 1865, in consideration of policy No. 3202, and is in all other respects similar to that above set forth. It is averred in the complaint, that on the 8th day of July, 1867, an action was instituted in the circuit court of Marion county, in this State, against the said Sinnissippi Insurance Company, and that such proceedings were had thereon that afterwards, on the 23d day of November, 1867, by the judgment and decree of said court, the franchises of said company were declared forfeited, and the said Whitman was appointed receiver of said company, and was thereby authorized and directed to take possession of all the property, notes, and assets, of said company. And it was further ordered and decreed, that, for the purpose of paying the liabilities of said company for losses by fire, there should be levied and assessed upon the premium notes held by said company, a sum equal to the then unpaid assessments theretofore made by said company on said premium notes, with twenty per cent. on the face of said notes in addition thereto, which the plaintiff, as such receiver, was authorized and directed to collect and receive. It is also averred in the complaint, that the unpaid assessments made by said company, prior to the 27th of July, 1867, on the premium note of the defendant referred to in the first paragraph, amount to the sum of sixty-two dollars and forty cents, and the further assessment of twenty per cent. thereon, directed by the decree of the court, amounts to forty-eight dollars, making in all one hundred and ten dollars and forty cents; and that the unpaid assessments made by the company, prior to the 27th of July, 1867, on the note of the defendant referred to in the second paragraph, amount to the sum of nineteen dollars and twenty cents; and the further assessment of twenty per cent. thereon, under the decree of the court, amounts to the sum of twenty-four dollars, making an aggregate of forty-three dollars and twenty cents.

A demurrer was filed to the complaint, which was overruled, to which the defendant excepted.

An answer was then filed, consisting of six paragraphs. The court sustained a demurrer to the second, third, fourth, and sixth paragraphs, to which the defendant excepted. He then withdrew the first and fifth paragraphs, and final judgment was rendered on the demurrers to the others.

The second paragraph alleges, that, before the appointment of the plaintiff as receiver of said company, by an agreement between the defendant and one George W. Whitcomb, the agent of said company, and by the authority of the company, the said contracts of insurance were rescinded, and the defendant surrendered and returned to the company his policies of insurance for which the notes sued on were given; that the defendant, having paid to said company all assessments made on said notes prior to the date of said contract of rescission, agreed that the company should retain the amount so paid; and in consideration thereof and of the surrender of said policies, it was agreed that said company should return and surrender up to the defendant said premium notes.

The third paragraph alleges, that at the time of the execution of said premium notes, said company by its agent falsely represented to the defendant that the company was worth two million dollars, and was solvent and able to pay all losses; that no assessment would be made on said notes under twelve months from the date of their execution; that subsequent assessments would not be made oftener than once a year; that no assessment would ever exceed ten per cent. of the amount of said notes; and that the financial condition of the company was so flourishing and prosperous that it was more than probable that no assessment would be made against the defendant during the five years his policy had to run; that the defendant relying on said representations was induced thereby to enter into said contracts and execute said notes; that said company was then, in fact, insolvent and unable to pay losses, and was not worth

any considerable sum; that said representations were false and fraudulent; that an assessment was made on said notes in less than twelve months from their date, and subsequent assessments were made thereon oftener than once in twelve months, and for more than ten per cent. of the amount of said notes.

The fourth paragraph alleges, that the officers of the insurance company entered into a fraudulent combination with Ross and Cluggish, and thereby procured the institution of the suit against said company by Ross and Cluggish in the Marion Circuit Court, and by fraud, collusion, improper admissions, and false testimony, procured the decree, assessment, and appointment of the plaintiff as receiver, as stated in the complaint.

The sixth paragraph alleges, that in December, 1865, and after paying all assessments made prior thereto, he sold and conveyed the property insured in said policies to one Moore; and that, by agreement with the company, he surrendered to them his said policies of insurance, and said contracts were rescinded, the company being released from all liability and retaining the amounts paid on said insurance.

Elliott, J.—The ruling of the court upon the demurrer to the complaint raises the first question presented in this case.

The only objection urged to the complaint is, that it is not accompanied by a transcript of the decree of the Marion Circuit Court in the case of Ross and Cluggish against the insurance company, by which the plaintiff was appointed receiver of the company and the assessment made on the premium notes. The objection cannot be sustained.

The suit is founded on the premium notes, and not on the decree of the Marion Circuit Court, within the purview of the seventy-eighth section of the code. The plaintiff's right to sue on the notes and the fact that a legal assessment had been made rest in averment, but the statute does not require that the evidence or a copy of it, by which the

facts are to be proved, should be filed with the complaint, as it is not the foundation of the action, though essential to a recovery.

Errors are also assigned on the ruling of the court in sustaining demurrers to the second, third, fourth, and sixth paragraphs of the appellant's answer.

The second paragraph sets up a rescission of the contracts of insurance and a surrender of the policies for which the notes sued on were given, before the proceedings were commenced in the Marion Circuit Court, under which the plaintiff was appointed receiver of said company. It is contended on behalf of the appellee that this paragraph is bad, for the reason that neither the directors of the company nor any agent thereof, acting by their authority, possessed the power to rescind said contracts of insurance or release the appellant from the obligation of said notes, during the period the policies were to run.

In support of this position, it is argued that, the insurance company being a mutual one, organized under the laws of this State, the appellant, by virtue of his policies and the execution of the premium notes, became a member of said company, and that all the other policy holders in said company were parties in interest in the premium notes executed by the appellant, and that the appellant could not, therefore, be permitted to withdraw from the company, or be released from the obligations created by said notes, without the consent of all the other policy holders. It is true, that the appellant by virtue of his policies became a member of the company, and so continued as long as he remained insured, and was liable to assessments on his premium notes for losses to the company by fire, occurring whilst he was so insured. But the management and control of the affairs and business of such companies are committed to and invested in a board of directors, elected by the corporators, and the directors elect a president, vice president, and treasurer, and may also appoint agents of the company for the transaction of such business as may be properly transacted

by them. The directors represent the corporation and the corporators, and the latter are bound by the acts of the directors in all matters properly pertaining to the business of the company. A policy of insurance and the premium notes given therefor constitute a contract between the company and the insured, and no reason is perceived why such a contract may not be rescinded by the mutual agreement of the insured and the corporation, the latter acting through its board of directors or an agent duly authorized by them; such a power on the part of the board of directors, it seems to us, is essentially necessary to the safe and proper transaction of the business of the company.

We think the paragraph was good, and the demurrer to it should not have been sustained.

The third paragraph presents a more doubtful question. The alleged representations as to the times and amounts of the assessments that might be made on the premium notes, amount to nothing as a defense. Under the statute, assessments on the premium notes could only be made to pay losses by fire, and as the appellant is presumed to know the law, he must be presumed to know the dates of such assessments, and the amounts thereof depended entirely on the dates and amounts of such losses, which it was impossible at that time to foresee or foretell, and it was therefore his own folly, if he confided in any representations made by the agent of the company. But it is alleged that the agent, by the authority of the directors, represented that the company was entirely solvent and able to pay all losses, and was then worth two million dollars, and that appellant relied on said representations, and was induced thereby to enter into said contracts of insurance; but that, in fact, the company was then insolvent and not able to pay losses, and that it was not worth any considerable amount.

In view of the principle on which the company is organized, it is but reasonable to presume that the alleged representation that the company was then worth two million dollars had reference to the amount of the premium notes

held by the company, on which assessments might be made to pay losses. With this construction, do the allegations constitute a defense to the action? The question is certainly not a very clear one, but the majority of the court are inclined to hold the paragraph good.

The fourth paragraph is clearly bad. If the appellant can impeach the decree of the Marion Circuit Court in this collateral manner for fraud, still the paragraph is bad, because it fails to allege any material facts constituting fraud.

The sixth paragraph is good, for the reasons stated in discussing the second paragraph. Besides, the policies became void on the sale and conveyance of the property by the appellant, unless they had been assigned to the purchaser by the consent of the company; and the appellant would not be liable to be assessed on his premium notes for losses occurring after such sale and conveyance.

The judgment is reversed, with costs, and the cause remanded, with directions to the common pleas to overrule the demurrer to the second, third, and sixth paragraphs of the answer, and for further proceedings.

A. B. Carlton, for appellant.

F. Wilson, *A. C. Voris*, *J. E. McDonald*, *A. L. Roache*, and *E. M. McDonald*, for appellee.

STROUD and Another *v.* WHITMAN, Receiver of the Sinnissippi Insurance Company.

APPEAL from the Lawrence Common Pleas.

ELLIOTT, J.—This case is in all respects similar to, and involves precisely the same questions discussed and decided in, *Boland* v. *Whitman*, Receiver, &c., at this term, *ante*, p.

64, except the questions arising in that case on the sixth paragraph of the answer.

The judgment is reversed, with costs, for errors of the court in sustaining demurrers to the second and third paragraphs of the answer, and the cause remanded, with directions to the court below to overrule the demurrers to those paragraphs, and for further proceedings.

A. B. Carlton, for appellants.

F. Wilson, A. C. Voris, J. E. McDonald, A. L. Roache, and *E. M. McDonald*, for appellee.

BRIGGS *v.* WHITMAN, Receiver of the Sinnissippi Insurance Company.

APPEAL from the Lawrence Common Pleas.

ELLIOTT, J.—This case is in all respects similar to, and involves precisely the same questions discussed and decided in, *Boland* v. *Whitman*, at this term, *ante*, p. 64, except the question arising in that case on the sixth paragraph of the answer.

The judgment is reversed, with costs, for errors of the court in sustaining demurrers to the second and third paragraphs of the answer, and the cause remanded, with directions to the court below to overrule the demurrers to those paragraphs, and for futher proceedings.

A. B. Carlton, for appellant.

F. Wilson, A. C. Voris, J. E. McDonald, A. L. Roache, and *E. M. McDonald*, for appellee.

Ellsworth and Others *v.* Mace and Others.

Trust.—*Contract.—Construction of.*—A contract executed and acknowledged by A. and duly recorded, recited, that B. had made a proposition to A. to invest money in lands, the title thereof to be vested in A., who was to convey to B. half the profits after deducting the capital of A. invested and interest, at the end of five or ten years, as most agreeable to A., which capital and interest was to be reimbursed to A. by sale or appraisement of the land, the expense of locating or purchasing the lands to be divided equally between A. and B.; that A. had accepted said proposition, and, in pursuance of the agreement so made, B. had invested divers sums and delivered to A. the evidences of title, in a satisfactory manner, of certain lands described; and then the contract provided that, in consideration of the facts so recited and one dollar, received of B., A., binding his heirs and executors, covenanted and agreed with B. and his heirs and executors to hold said lands for the purpose mentioned in said recital for five years from the time the capital was invested (unless it should be mutually agreed by A. and B. to sell the same or any part thereof sooner); that whenever a certain sum with interest thereon from a certain date, with all sums paid for taxes, or improvements made by A. with B.'s consent, and interest thereon, should be reimbursed by public sale or otherwise, one half of the surplus profit over and above said money expended and interest thereon should be paid to B. his heirs and executors; that if said capital and interest should be reimbursed by partial sales, the residue of lands should remain in the hands of A. and B. until the expiration of said ten years, unless sooner sold or divided; that B. was empowered and authorized to take the care and agency of said lands and do whatever should be necessary to protect and preserve them from waste or injury, and to make such betterment and improvements as should be agreed to by A. in writing; that B. was authorized and empowered to sell, deed, and convey the lands in A.'s name or to bargain them by article or agreement, but that no sale should be obligatory without A.'s consent in writing. Afterwards, within five years, sundry parcels of the lands were sold and conveyed, from the proceeds of which A. was reimbursed for all the investments secured to him by the contract, leaving a portion of the lands undisposed of.

Held, that B. had under said contract an interest in said remaining lands as *cestui que trust*, which could be enforced against A.

APPEAL from the Tippecanoe Circuit Court.

Frazer, J.—In June, 1850, Wheeler executed to Henry L. Ellsworth, deceased, the following contract, which was acknowledged and duly recorded:

"Whereas Henry L. Ellsworth, late of Hartford, Con-

necticut, now of Lafayette, Indiana, made to me, the undersigned covenantor, Charles F. Wheeler, of Lafayette, County of Tippecanoe, and State of Indiana, a proposition to invest money in Western lands upon the following terms, viz.: The title of the land purchased to be vested in myself, with the obligation on my part to convey to said Henry half of the profits, after deducting my capital invested and six per cent. interest for the use of the money, at the end of five or ten years, as most agreeable to myself, which capital and interest was to be reimbursed to me by sale or appraisal of the land, and the expenses of locating said lands or purchasing the same was estimated at two and a half per cent., which sum of two and a half per cent, was to be divided equally between myself and the said Henry; which proposition was by me accepted, and in pursuance of said agreement said Henry has invested divers sums and delivered to said Wheeler the evidences of title in a satisfactory manner in and to the following lots and parcels of land, viz.: Sections thirty-four, (34), thirty-three, (33), thirty-two, (32), S. ½, S. W. ¼, S. ½, S. E. ¼, S. E. ¼, twenty-nine, (29), Town. 26, 17 West; also Sections three, (3), four, (4), five, (5), eight, (8), nine, (9), in Township twenty-five, containing in all five thousand four hundred and forty acres, more or less, according to Government survey; all which land lies in Indiana, or was entered at the Crawfordsville land office:

"Now, therefore, in consideration of the above and one dollar, received of the said Henry L., the said Charles F. Wheeler does hereby covenant and agree with the said Henry and his heirs and executors, and hereby bind my heirs and executors to fulfil the same, that I will hold said lands for the purpose above mentioned for the term of five years from the time said capital was invested (unless it should be mutually agreed by said Wheeler and said Henry to sell the same or any part of the same sooner than five years); and whenever the following sums, viz: three thousand eight hundred and eighty dollars from 15th September, 1848, with interest on the same at seven per cent. per

annum, together with all the sums expended for taxes or improvements made by said Wheeler with consent of said Henry, and interest at seven per cent. on the same shall be reimbursed by public sale or otherwise, that one-half of the surplus profit over and above the said money expended and interest on the same shall be paid to said Henry, his heirs and executors; and if said capital and interest shall be reimbursed by partial sales, the residue of lands shall remain in the hands of said Wheeler and said Henry until the expiration of said ten years, unless sooner sold or divided. And said Henry is hereby fully empowered and authorized to take the care and agency of said lands and do whatever is necessary to protect and preserve the same from waste or injury, and to make such betterment and improvements as shall be agreed to by myself in writing; and the said Henry is further authorized and empowered to sell, deed and convey the same in my name, or to bargain the same by article or agreement; provided, no sale or agreement shall be obligatory without my consent in writing first had been obtained.

"IN WITNESS WHEREOF, I have hereunto set my hand and seal, this 13th day of June, 1850.

"CHARLES F. WHEELER. [SEAL.]"

In 1850 and 1851, sundry parcels of the lands were sold and conveyed, realizing thereby a sum sufficient to reimburse Wheeler for the money specified in the contract, $3,880, with the interest, and all other investments secured to him by the contract; and leaving in addition thereto a surplus of thirteen hundred dollars, which he has held since April, 1851; and leaving also nearly four thousand acres of the lands still undisposed of, a portion of which, say one thousand five hundred and sixty acres, were afterwards conveyed by Wheeler to Daniel Mace, under such circumstances that it is not questioned here that the title in him remained liable to such equities in favor of Ellsworth as would subsist if it had remained in Wheeler. The complaint, showing the foregoing facts, was by the heirs at law

of Ellsworth against Mace and Wheeler to enforce those equities. The court below sustained a demurrer to it; and upon that ruling arises the only question.

We are to inquire then, whether Ellsworth had under the contract any equitable interest in the land which could have been enforced against Wheeler.

It is insisted by the appellees that *Ellsworth* v. *Pomeroy*, 26 Ind., 158, fully sustains the ruling of the court below. It seems to us, however, that that case can have no application to the question now under consideration. We regarded that as a close case. There the contract was one of agency; Ellsworth, the agent, to be compensated for his services, not by an interest in the land, but out of the proceeds of sales to be made by him within a certain period, and not afterwards, first reimbursing Pomeroy his investment. The agent had not made any sales, and was prevented by Pomeroy's death from discharging the service contemplated by the contract within the time limited; and it did not appear that if left at full liberty to sell, Ellsworth could, within the time fixed, have realized anything as profits to be divided. Here, however, the contract is altogether different. The formal relation of principal and agent is created, it is true, and some service is to be rendered by Ellsworth. He has already furnished much of the consideration which was sufficient to move Wheeler to enter into the contract which we have copied, and already mainly earned his compensation, which the agreement by Wheeler secures to him. And what is it? Wheeler covenants to "hold for five years (unless otherwise agreed) said lands" for certain specified purposes, viz.: first, to repay himself by the proceeds of sales to be made the money expended in the purchase, with interest thereon, and also all sums expended for taxes and for improvements made with Ellsworth's consent; and secondly, "one half of the surplus * * shall be paid to Ellsworth;" and when the first purpose, his own reimbursement as aforesaid, shall be accomplished, the lands "shall remain in the hands of both

parties" for a period of five years longer, "unless sooner sold or *divided.*" A small portion of the lands, sold within the period fixed, affords a fund as profits to be divided, and the lands now in question remain. It is difficult to conceive of a trust, plainly and explicitly declared, if this be not a trust, and we know not how the proposition can be set in a clearer light than appears by a statement of the case.

It is argued that Wheeler and Ellsworth were not partners. We are inclined to agree that they were not; but it does not follow that there was no trust, and that Ellsworth acquired no equity in the lands by the arrangement and events which occurred. A trust is an equitable interest in property distinct from its legal ownership. He who holds the legal title is trustee, and he for whose benefit it is held is the *cestui que trust.* In the language of SWAYNE, J., in *Seymour* v. *Freer*, 8 Wal. 202, a case involving facts slightly similar to this, but far less clearly indicating a trust—changing that language only by substituting the names of parties: "the object of the trust here was to sell the property, and after deducting from the proceeds the outlay, with interest and taxes, &c., to pay over to Ellsworth one half the residue." In this case, indeed, it was contemplated by the contract that the parties might divide the lands remaining after Wheeler was compensated for his investments. And yet in that case it was agreed by the whole court that there was no partnership, though a beneficial interest in Price as *cestui que trust*, long after the lapse of five years, when the lands had become immensely valuable, was held to exist, the agreement being express that the lands should all be sold in five years, Price to receive one half the profits *thus resulting* and nothing in any other manner; and it was admitted that it was doubtful whether the lands if sold within the five years would have realized the original investment with interest. We should hesitate before going so far. There is almost an infinite variety of modes by which a trust may be created besides a partnership where one partner holds the legal title of the partnership property.

It is further urged, that to enforce this trust would be inequitable, inasmuch as the service rendered by Ellsworth was trifling. This is not a forcible consideration in the present case. It could have been pertinently replied that the return of the capital invested by Wheeler with accumulated interest at seven per cent. per annum, a profit for the use of money which was at the time condemned by our law in cases of loan as exorbitant and oppressive, ought to silence him or those who stand in his place when they attempt such an argument. The plain fact is, that one party furnished the money, and the other supplied the care and judgment to invest it profitably, with an agreement to give to Wheeler a fair compensation for the use of his capital, and one half of the remainder of the property purchased besides, and to Ellsworth the other half. That the venture was immensely profitable must be deemed quite as much on account of the good judgment with which the lands were selected as because of the act of Wheeler in furnishing the capital. It was a fair business transaction, free from any taint of unconscionable advantage, and ought to be enforced.

Reversed, with costs, cause remanded, with directions to overrule the demurrer.

GREGORY, C. J., having been of counsel, did not sit in this cause.

S. A. Huff and *R. Jones*, for appellants.

H. W. Chase, *J. A. Wilstach*, and *E. H. Brackett*, for appellees.

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NASH, Auditor, *v.* THE STATE, on the Relation of BLACK and Others.

COURT ROOM.—*Repairing and Furnishing.*—Courts of record, authorized to use

a seal, and having jurisdiction beyond that of justices of the peace, have power in this State to order the repairing and furnishing of their court rooms.

APPEAL from the Cass Common Pleas.

GREGORY, C. J.—This was a proceeding by mandate against the county auditor, to compel him to issue a warrant on the county treasurer for the payment to the relators of the sums of money due them for work done in repairing and furnishing the court room, under the order of the judge of the common pleas court of Cass county.

It is claimed that it is exclusively within the power of the county commissioners to order such improvements, and that therefore the order of the judge was void.

The statute provides, that "such commissioners shall cause a court house * * * to be erected and furnished, where the same has not been done, and shall keep all the public buildings of the county in repair;" and also confers the power to borrow money for such purposes. 1 G. & H. 250, 251, secs. 16, 17.

By the act of May 27th, 1852, to authorize and limit allowances by courts and boards, and drafts upon county treasurers, it is provided, that the county auditor may draw his warrant on the treasurer for a sum allowed, or certified to be due by any court of record, authorized to use a seal, and having jurisdiction beyond that of justices of the peace. It also provides that the said courts may allow such sums as may be due to persons furnishing furniture for the court room, or "making repairs thereof." 1 G. & H. 64, secs. 3, 5.

We think that by a fair construction of these statutes, the court of common pleas had the power to order the repairing and furnishing of the court room.

It was undoubtedly the duty of the county commissioners to keep the court house in repair, but this did not take from the courts of record the power to order repairs to their court rooms.

Perhaps a literal reading of section five, *supra*, would confine the power to make repairs to the furniture, and not to the room; but this would be a very narrow construction

of the section, and not in accordance with the rules for the construction of statutes.

Judgment affirmed, with costs.

W. Z. Stuart and *D. D. Dykeman*, for appellant.

D. P. Baldwin, for appellees.

KISSINGER *v.* HANSELMAN.

HIGHWAY.—*Neighborhood Road.*—A neighborhood road is not a private road, and the question whether the right of eminent domain may be exercised to take land for a private road is not applicable to it.

SAME.—*Location of.*—*Record.*—The record of the board of county commissioners in a proceeding to locate a highway need not contain the evidence by which it was proved that the proper notice had been given of the intention to present the petition for the highway;—it is enough if the record shows that the fact was proved, without showing how it was proved.

JUDGMENT.—*Form of.*—*Supreme Court.*—A question as to the form of a judgment cannot be made in the Supreme Court if not saved by objection and exception below.

APPEAL from the Vanderburgh Common Pleas.

This was an action by the appellee against the appellant, the complaint alleging, that in 1861, the board of commissioners of Vanderburgh county, at their December term, located a certain road, described in the complaint, and ordered it to be opened by the appellee to the width of twenty-five feet, on payment of damages assessed; that the damages assessed were paid, and said road was opened according to law; that on the — day of February, 1865, the appellant obstructed said road by building a fence thereon, and now obstructs said road by maintaining a fence along, upon, and across the same; that the fence is an obstruction to the free use of appellee's property, to the great damage and inconvenience of appellee and other citizens; and that said obstruction essentially interferes with the appellee in the com-

fortable enjoyment of his property, to his damage in the sum of one hundred dollars. Prayer for judgment for one hundred dollars as damages, that the nuisance be abated, and that the defendant be enjoined, &c.

The defendant answered in three paragraphs, first, the general denial; second, admitting the obstruction, but alleging that the fence was placed across the road by the license of the plaintiff; third, that the cause of action did not accrue within two years.

Reply in denial. Trial by jury. Verdict for the plaintiff, with one cent damages. Motion for a new trial overruled, and exception. Judgment for one cent; for the removal of the fence; and enjoining the maintenance thereof.

The overruling of the motion for a new trial, and the rendering of the judgment set out in the record, are assigned as errors.

Under the former assignment, the appellant claims that the act authorizing the location of private roads is unconstitutional, and that the board of commissioners therefore had no power to locate the road in question; also, that the proceedings of the board of commissioners, introduced in evidence, did not show the requisite notice, and that therefore the order of the board was void.

The petition to the commissioners, signed and presented by twenty-three citizens of the township, asked the location of "a certain private road, for the purpose of having access to the burial ground known as," &c.

FRAZER, J.—We are of opinion that the road in question was a *public* highway, and, consequently, that the questions most pressed for the appellant are not in the case. We cannot assent to the position assumed by the Supreme Court of Missouri, in *Dickey* v. *Tennison*, 27 Mo. 373, that a neighborhood road is only a private road. If that be so, then half the highways in Indiana are of that class—void in their inception, if, as the appellant contends, the right of

eminent domain cannot be exercised to take land for them; and not in any respect under the jurisdiction of the local authorities, nor to be opened or kept in repair by the public.

The commissioners' record need not contain the evidence by which it was proved that the proper notice had been given of the intention to present the petition for the highway; it is enough that it should appear by the record that the fact was proved, and it need not be shown how it was proved.

Whether the decree of injunction was erroneous is not a question in the record, not having been saved by an objection and exception below. *Stretch* v. *Schenck*, 23 Ind. 77.

Affirmed, with costs.

C. Denby, *D. B. Kumler*, and *J. G. Jones*, for appellant.

A. Iglehart and *R. A. Hill*, for appellee.

Achey *v.* The State, on the Relation of Barnes.

Supreme Court.— *Weight of Evidence.*—The Supreme Court will not interfere, upon the weight of the evidence, with a finding, unless it is clearly against the evidence, and can be considered only as the result of passion, prejudice, or a palpable misapprehension of the facts.

APPEAL from the Marion Common Pleas.

Gregory, C. J.—The appellant and her sureties (who were not, however, served with process) were sued on a bond executed by them, conditioned for the faithful performance of her duties as executrix of the estate of Henry Achey, deceased. The breaches alleged are, a failure to inventory the property of the decedent and make return thereof according to law, and the conversion of certain specified assets which came to her hands to be adminstered. The relator had obtained his judgment against the estate.

The case is here on the evidence. We have examined the testimony, and from that examination we are satisfied that the court below was justified in coming to the conclusion arrived at.

There were quite a number of items about which there was a controversy, and the case turned upon the weight to be given to the circumstances in proof. In such a case it is not our province to interfere with the finding, unless it is clearly against the evidence, and can be considered only as the result of passion, prejudice, or a palpable misapprehension of the facts.

There is rather an interesting question argued by counsel as to the ownership of the proceeds of a boarding house, kept by the wife of the decedent in the lifetime of the latter. But in our view of the case, this question is of no importance, as a solution of it favorable to the appellant would not affect the finding of the court below.

Judgment affirmed, with costs

J. S. Harvey and *J. Van Horn*, for appellant.

S. E. Perkins, *L. Jordan*, and *S. E. Perkins, Jr.*, for appellee.

Crane *v.* Waggoner and Wife.

Exemption.— *Wife.*—Where husband and wife are living together, and the property of the husband is not of the value of three hundred dollars, and the wife is the owner of property levied upon under an execution, and is the real debtor in the judgment and execution, she may claim exemption under the statute, 2. G & H. 367, of her said property to the extent necessary to make with her husband's property the amount of three hundred dollars protected by the statute.

APPEAL from the Bartholomew Circuit Court.

Ray, J—The appellees brought suit for partition in the

right of the wife against the appellant and wife, and also for use and occupation of the portion of the premises which should be set off to the appellees. Judgment was rendered for partition and for a certain sum for use and occupation. On appeal to this court, the money judgment was reversed, with costs. *Crane* v. *Waggoner*, 27 Ind. 52. Subsequently, the sheriff of Bartholomew county levied upon the portion of the real estate set off to Sarah C. Waggoner in the partition proceeding, to satisfy the judgment for costs. Sarah C. Waggoner thereupon offered to file a schedule of property owned by her, consisting of this real estate, upon which the levy was made, and averring that it was only of the value of one hundred and fifty dollars, and selected an appraiser and requested the sheriff to appoint another, to appraise the property. She also included a list of personal property filed by her husband as owned by him, amounting to fifty dollars. The sheriff, denying the claim of the wife to exemption under the statute, refused to receive the schedule and was about to proceed with the sale, when these proceedings were brought in the circuit court to enjoin further action under the levy. Said Sarah, after stating in her petition the above facts, alleges that she is the mother of four children, who reside with her and her husband; that she assists with her needle to maintain the family; and that the entire property owned by her consists of the real estate in question, whose value does not exceed one hundred and fifty dollars, and her husband's entire property is not worth over fifty dollars. A demurrer was filed to this petition, which was overruled by the court, and an order was granted enjoining the sale of the property.

It is insisted that this was error, and that the husband alone, as the head of the family, can claim the protection of the statute. Its language is as follows:

"Whereas, the constitution of the State declares that 'the privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale, for

the payment of any debt or liability hereafter contracted,' therefore:

"Section 1. *Be it enacted by the General Assembly of the State of Indiana*, That an amount of property not exceeding in value three hundred dollars, owned by any resident householder, shall not be liable to sale on execution, or any other final process from a court, for any debt growing out of, or founded upon a contract, express or implied, after the fourth of July eighteen hundred and fifty-two." 2 G. & H. 367.

It will be observed that the clause of the bill of rights cited extends this protection to the "debtor," and that the act itself is intended to be a fulfilment of the duty therein imposed upon the legislature. The language of the law must therefore be construed with regard to the declared object and purpose to be accomplished, and effect given so far as reasonably can be to the constitutional declaration. The plain intent is to preserve a home or support for the family, and not for its head as distinguished from its members. Where, therefore, the husband and wife are living together, and the property of the husband does not reach the limit fixed by law, and the wife is the owner of the property levied upon and yet claimed as exempt, and is herself the real debtor in the judgment and execution, we must regard her claim to exemption as valid to the extent necessary to make, with her husband's property, the amount protected by the statute. The original cause of action was upon an implied contract for use and occupation, and although we could not sustain the recovery, still the action sounded in contract, and not in tort, and was, therefore, within the class of actions in which this exemption is allowed.

Judgment affirmed, with costs.

F. T. Hord, for appellant.

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SMITH v. KRUGER.

SUPREME COURT.— *Weight of Evidence.*—The Supreme Court will not, upon the weight of the evidence of witnesses who testified before the lower court, interfere with the finding, unless it is clearly against the evidence and can be considered only as the result of passion, prejudice, or palpable misapprehension of the facts.

APPEAL from the Marion Circuit Court.

GREGORY, C. J.—This case is here upon the evidence. The matter in dispute between the parties seems to be this: Smith and Kruger had been partners in two street contracts, one on Circle street, and the other on Washington street. Kruger, according to his claim, offered to Smith, to stand all the loss that had been made, if Smith would get some one to take the contract off their hands. The Washington street contract had been completed at the time of this offer. The loss on the Circle street contract was about two thousand dollars, but there had been a profit on the other contract of about eight hundred dollars, making the loss, including both, of some twelve hundred dollars. Kruger claims that he should only be charged on settlement with the actual loss, while Smith claims that Kruger should be charged with a loss of two thousand dollars.

We have examined the evidence, which is in the record. The case was tried by the judge of the court below, who heard all the evidence from the witnesses themselves. It is not our province to interfere with his finding, unless it is clearly against the evidence, and can be considered only as the result of passion, prejudice, or a palpable misapprehension of the facts.

We are not prepared to say that the finding is even against the weight of the evidence. The result arrived at was certainly an equitable one, and we see nothing in the testimony which under any rule of law would require a different finding.

It is claimed, that there had been an account stated be-

tween the parties, and that it could not be disregarded by the court in the absence of fraud or mistake, but we do not so regard the facts. One of the matters disputed was this very question of accounting. Indeed, there was an issue made by the pleadings presenting it.

The court below committed no error in overruling the motion for a new trial.

Judgment affirmed, with costs.

B. K. Elliott and *C. L. Holstein*, for appellant.

A. G. Porter, *B. Harrison*, and *W. P. Fishback* for appellee.

PATTISON and Another *v.* JENKINS.

INTEREST.—*Remedy.*—*Act of* 1867.—A note containing a stipulation for interest at ten per cent. per annum was executed when the law prohibited a recovery of interest exceeding six per cent. per annum; and suit was brought thereon under the act of 1867, authorizing such contracts.

Held, that the contract as to interest was governed by the law of 1867.

SALE.—A. exhibited to B. a schedule, as a representation of the quantity of certain personal property, which the former proposed to sell to the latter, who before purchasing, visited the place where the property was situated, for the purpose of examining the property and satisfying himself concerning it, and having examined it as to quantity, or having had a full opportunity to do so, relying on his own judgment, proposed other terms than those proposed by A., by offering a sum in gross for an entire amount of property, including that named in said schedule and other articles situated at the same place, and A. accepted the offer, and the sale was made on the terms so proposed by B.

Held, in a suit on a note given in part payment, that the maker could not set up as a failure of consideration, that the property named in said schedule was of less quantity than therein represented; and that the buyer could not claim that the seller had deceived him as to the quantity of the property named in the schedule.

SAME.—Where a full opportunity is afforded to a purchaser for examining property, which he is about to purchase, and which by the exercise of ordinary diligence and prudence he could examine as to its quantity, the question of the quantity being made to depend merely on the judgment,

and he fails to exercise such diligence and prudence, he cannot after the sale complain that he has been deceived as to the quantity, or claim a deduction from the price on account of the quantity.

APPEAL from the Marion Common Pleas.

The appellee sued the appellants on a promissory note executed by them to one Igoe, March 1st, 1867, for six hundred and thirty-five dollars, payable on the 1st of October, 1867, with interest at ten per cent. per annum, and assigned to the appellee.

The appellants answered in three paragraphs, first, admitting the execution and assignment of the note, but alleging, that it was given to the payee in part consideration for the purchase by the appellants of said Igoe of one-half interest in certain personal property described, and for no other consideration; that at the time of said purchase Igoe exhibited to the appellants a written schedule of said property, and asserted and guaranteed to the appellants that said articles were on a plantation near Montgomery, Alabama, and that in consideration of the payment of a certain sum and the execution of said note, he would transfer to the appellants the property as represented in said schedule; that the appellants, relying on the statements of Igoe as to the amount and quantity of said property, paid said sum and gave the note sued on; that afterwards, when the appellants got possession of said property and ascertained the amount thereof, it was found that said property was short of the amount purchased by four hundred bushels of corn, thirteen sets of harness, ten plows, and thirty-five hoes; and that the damage to the appellants by reason of said property so being short was nine hundred dollars. Wherefore, the defendant alleged that the consideration of the note had failed. The second paragraph admits the execution and assignment of the note and alleges that it was given without any consideration whatever.

The third also admits the execution and assignment, but alleges that the note was obtained by the payee by and through his fraud and deceit, in that he represented that he

was the owner of one-half of certain property described, situated near Montgomery, Alabama, and exhibited to appellants a written schedule of said property and assured the appellants that every article and the quantity thereof as set forth in such schedule was there and should be delivered to appellants; that appellants had no means of knowing the truth of said statements but the verbal and written statements of the payee as aforesaid, and relied wholly upon said statements and purchased said property for the sum of $——, and paid the payee all cash, except the sum for which he gave the note; that said statements were untrue, in this, that there was not the quantity of corn represented by four hundred bushels, worth six hundred dollars, &c. Wherefore, the defendants alleged that they were damaged in the sum of nine hundred dollars, &c.

Reply in denial of each paragraph of the answer.

Trial by jury. Verdict for the plaintiff for the face of the note and ten per cent. interest from the date thereof.

The appellant filed a motion for a new trial for the following reasons:

"1. The verdict of the jury is not sustained by the evidence and is contrary thereto.

"2. The amount of damages assessed by the jury is too large.

"3. The court misdirected the jury as to the law applicable to the case in the instruction numbered four given by the court of its own motion, and in the instructions given by the court at the instance of the plaintiff, numbered one, two, three, and four, and excepted to at the time."

The court overruled the motion, and rendered judgment for the full amount of the verdict, the appellants excepting.

The fourth instruction given by the court of its own motion was as follows:

"If the schedule of property was exhibited to the defendants by Igoe as a mere representation of the amount and quantity of the property proposed to be sold, and one of the defendants went to the premises for the purpose of

examining the property and satisfying himself as to the same, and after having examined the same, or having an opportunity of doing so, he then, relying on his judgment, proposed other terms than those proposed, by offering a sum in gross for the entire property on the plantation, including the articles named in the schedule together with other property, and Igoe accepted the offer, and the note was made for a part of the purchase-money; in that case, the defendants are not entitled to damages."

The first, second, third, and fourth instructions given at the request of the appellee, were as follows:

"1. If you believe from the evidence that the sale of the property, for which the note sued on was given, was consummated at a place ten miles distant from where the property was situated; that prior to such sale the defendant T. T. N. Pattison twice visited the property, for the purpose of examining it; that a full opportunity of examining it was afforded him; that the sale was concluded the day after Pattison had visited it for the purpose of examining it; that by the exercise of ordinary diligence and prudence he might have examined it and formed his own judgment concerning it; and the sale was in gross and for a gross and general sum; you should find for the plaintiff.

"2. Where a full and ample opportunity is afforded a purchaser for examining property which he is about to purchase and which he could by the exercise of ordinary diligence and prudence examine, and he fails to use such diligence and prudence, he cannot afterwards complain that he was deceived.

"3. If a full and ample opportunity was possessed by T. T. N. Pattison to examine the property which he proposed to purchase, and he made an examination and, upon his own judgment, made an offer of $2,250 for the property, which was accepted by Igoe, and the note sued on was executed pursuent to said contract, you should find for the plaintiff.

"4. If, after an examination as to the quantity of the property by the defendant T. T. N. Pattison, upon his own

judgment he made an offer of a gross sum for the property in bulk, which was accepted by Igoe, and the note sued on was given in part payment, your verdict should be for the plaintiff."

ELLIOTT, J.—The questions made in the case for the consideration of this court are all based on the refusal of the court to grant a new trial.

One of the reasons urged for a new trial is, that the verdict is excessive. The note sued on was for the sum of six hundred and thirty-five dollars, with interest at the rate of ten per cent. The verdict of the jury included interest at the rate specified in the note, and it is claimed by the appellants that as the note was given before the act of 1867, authorizing contracts in writing for interest at the rate of ten per cent. per annum, was enacted, the plaintiff was only entitled to recover interest at the rate of six per cent. This position rests upon the assumption that the act of 1867 is not retrospective in its operation, and that the case is governed by the interest law in force at the date of the note, which prohibited a recovery of interest at a rate exceeding six per cent.

We have heretofore held that the act in question applied to contracts made before its passage. *Sparks* v. *Clapper*, 30 Ind. 204; *Klingensmith* v. *Reed*, 31 Ind. 389.

It follows that the jury did right in computing the interest at the rate of ten per cent., and hence the verdict was not excessive.

Another question made in the case is, that the verdict is not sustained by the evidence.

It is insisted on behalf of the appellants, that the evidence sustains the matters of defense set up in the first and third paragraphs of the answer, which entitles them to deduction from the amount of the note of four hundred dollars, that being one-half of the value of the articles claimed to have been included in the contract of sale upon which the note was given, but which were not on the farm in Ad-

abama, and never came to the appellants' possession. The evidence in the case is quite lengthy, and only a small portion of it has been abstracted by the appellants, as required by the rules of this court.

On the other hand, it is claimed that T. T. N. Pattison, one the appellants, after the memorandum or inventory of the property claimed to be on the farm by Igoe was furnished him, visited the farm, once at least, before the contract was concluded, for the purpose of seeing and examining said property; that he did examine it, and especially the corn, which was in a bulk in the husk, and he became satisfied that there was from three to four hundred bushels less of it than was claimed by Igoe, and that he afterwards agreed to give said Igoe $2,250 for his entire interest in the property on the farm, including, in addition to that named in said inventory, one thousand bushels or more of cotton seed, worth fifteen cents a bushel, ten hogs, and a lot of poultry.

We have given the evidence a careful examination—in the absense of a proper abstract—because it was deemed proper to do so in connection with the questions raised on instructions given by the court to the jury; and, without giving a synopsis of the evidence here, we deem it sufficient to say in reference to it, that, whilst it is somewhat conflicting upon the material point in controversy, we think it clearly sustains the verdict of the jury.

The fourth instruction voluntarily given by the court, to which exception is taken, contains a fair and proper statement of the law arising upon the facts upon which it is hypothecated, and is pertinent to the evidence in the case. These remarks are alike applicable to the third and fourth instructions given by the court at the request of the appellee, to which objections are urged. They assert the very clear proposition, that if, after the schedule of the property referred to in the answer was furnished by Igoe to T. T. N. Pattison, the latter visited the farm where the property was, and examined it, as to quantity, and after such examina-

tion, and relying on his own judgment, he contracted to pay Igoe $2,250, for his interest in the whole property on the farm, and executed the note for a part of the purchase-money, the plaintiff was entitled to recover the full amount due on the note.

The first and second instructions given by the court at the request of the appellee, to which objections are also urged, are certainly correct, when applied to the quality of the property sold, and also to the quantity when that fact is made to depend merely on the judgment, as was evidently the case here as to the corn, the principal item in controversy. And if they were not so clearly applicable to the other items, still, in view of the other instructions given by the court and the evidence in the case, we think it evident that they could not have misled the jury.

The judgment is affirmed, with costs, and five per cent. damages.

W. Morrow and *N. Trusler*, for appellants.

B. K. Elliott and *C. L. Holstein*, for appellee.

Coleman *v.* Barnes.

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Jurisdiction.—*Circuit Court.*—The circuit court has not jurisdiction to review the record and judgment of the court of common pleas in a proceeding upon an application of a guardian to sell real estate, for the purpose of correcting a misdescription of the premises intended to be sold.

APPEAL from the Montgomery Circuit Court.

Ray, J.—Proceedings in the Montgomery Circuit Court to correct the record and judgment of the court of common pleas of the same county in regard to the application by a guardian to sell certain real estate, the order of sale, the report of the sale, and the confirmation of the same; in

all which proceedings, from the petition to sell to the confirmation of the sale, it was alleged there existed a misdescription of the premises intended to be sold. It was also claimed that after said property had passed through the hands of several succeeding purchasers, each deed containing the same error, it was mortgaged by the last purchaser by the same erroneous description.

The minors on whose behalf the guardian acted were made parties, and a judgment was rendered requiring the clerk to make the corrections desired. The want of jurisdiction in the circuit court over the cause is assigned for error. The objection is well taken. In *The Indiana & Illinois R. R. Co.* v. *Williams*, 22 Ind. 198, the principle was recognized that either of these courts, as to proceedings within its jurisdiction, is independent of the other, and in *Gregory* v. *Perdue*, 29 Ind. 66, it is stated, that "the rule is quite well settled, that one court cannot control the execution of the orders or process of any other court of equal jurisdiction." Nor can one court modify or change the record of another court of equal jurisdiction. But here the attempt is made by a court having no jurisdiction of the subject matter in which the alleged error occurred, to review and correct the proceeding of the only court having authority to act.

The judgment is reversed, with costs, and the cause remanded, with direction to dismiss the application.

J. W. Gordon and *W. March*, for appellant.

P. S. Kennedy and *R. H. Galloway*, for appellee.

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Brumfield and Others *v.* Carson and Others.

Statute of Frauds.—*Interest in Land.*—The right to use, for the purpose of worship, a church edifice when not occupied by the church to which it be-

longs, is an interest in real estate, and a contract therefor, to be valid, must be in writing, signed by the party to be charged.

APPEAL from the Wayne Common Pleas.

GREGORY, C. J.—The appellants filed a complaint in the court below against the appellees for specific performance of the following writing:

"ABINGTON, May 1st, 1854.

"We, whose names are here inserted in this book, promise to pay, or cause to be paid, to the trustees of the Evangelical Lutheran and United Brethren in Christ Churches, for the sole purpose of erecting a church edifice in Abington for said societies, which is to be free for all Christian denominations to worship in when unoccupied by themselves, by making application to the trustees. Subscriptions to be paid on or before Christmas, 1854."

This paper was signed by the appellants and others as contributors to the fund for the erection of the church edifice. It was not signed by either of the church corporations for which it was built. The complaint is, that one of these societies has relinquished to the other their entire interest in the building; that the trustees of the church now owning the property refuse to allow other Christian denominations to worship in the building when unoccupied by themselves. The appellants are not members of either of the churches for which the church edifice was erected, but were subscribers and contributors to the fund for the erection thereof and members of other Christian churches.

A demurrer was sustained to the complaint. The appellants then added a new paragraph, and asked for a mandate. A demurrer was also sustained to that paragraph. The action of the court below in sustaining these demurrers presents the questions involved in this appeal.

The right claimed, to use the church edifice to worship in when unoccupied by the church to which it belonged, is an interest in real estate, and a contract therefor, to be valid under the statute of frauds, must be in writing, signed by the party to be charged. This paper is not so signed.

That it was signed by the appellants is not enough. In *Laythoarp* v. *Bryant*, 2 Bing. N. C. 735, TINDAL, C. J., remarks, "It is said, unless the plaintiff signs there is a want of mutuality. Whose fault is that? The defendant might have required the vendor's signature to the contract; but the object of the statute was to secure the defendant's."

The principle, that the contract must have the signature of the party sued, was recognized in *Smith* v. *Smith*, 8 Blackf. 208.

Clearly, the facts charged do not make a proper case for mandate. The court committed no error in sustaining the demurrers.

Judgment affirmed, with costs.

J. B. Julian and *J. F. Julian*, for appellants.

W. A. Peelle and *H. C. Fox*, for appellees.

HEAGY and Another *v.* CHEESMAN, Administrator.

WILL.—*Construction of.*—A will contained the following clauses: "I give and devise to my beloved wife the farm on which we now reside, situate," &c., "containing," &c., "during her natural life, and all the *stock*, household goods, furniture, provisions, and other goods which may be thereon at the time of my decease, during her natural life, she, however, selling so much thereof as may be sufficient to pay my just debts;—in case there is not a sufficiency of *stock* to pay my debts, then to dispose of so much of the land as will satisfy the balance; at the decease of my wife the foregoing property to be equally divided between our legal heirs. I authorize my executors, if it shall become necessary to pay my debts, to sell by private sale, or in such manner and upon such terms as they may think proper, any part of my real estate sufficient to pay said debts."

At the time of the execution of the will, which was some years prior to the death of the testator, the value of his domestic animals on the farm exceeded the amount of his indebtedness, and he also owned a large amount of other personal property. At the time of his death, without issue, the live stock owned by him was not sufficient to discharge the liabilities of his estate.

Heagy and Another *v.* Cheesman, Administrator.

Held, that, for the payment of debts, according to the will, the live stock was first to be exhausted, and next the land was to be resorted to.

APPEAL from the Wayne Common Pleas.

FRAZER, J.—In 1849, the testator, William F. Culbertson, a farmer, executed a will, and subsequently, in 1864, he died, without issue, leaving a widow surviving him. When the will was executed, his live stock, such as horses, cattle, hogs, and sheep, exceeded in value the amount of his indebtedness. He had also at that time a large amount of other personal property, such as farm produce, farming utensils, wagons, carriages, &c. Afterwards he became more largely indebted, so that the live stock owned by him at the time of his death was not sufficient to discharge the liabilities of his estate. The will contained the following clauses:

"Item 1st. I give and devise to my beloved wife the farm on which we now reside, situate," &c., "containing three hundred and ten acres, during her natural life, and all the *stock*, household goods, furniture, provisions, and other goods which may be thereon at the time of my decease, during her natural life as aforesaid, she however selling so much thereof as may be sufficient to pay my just debts; in case there is not a sufficiency of *stock* to pay my debts, then to dispose of so much of the land as will satisfy the balance. Item 2d. At the decease of my wife the foregoing property to be equally divided between our legal heirs. Item 3d. * * * I authorize them (the executors), if it shall become necessary to pay my debts, to sell by private sale, or in such manner, and upon such terms as they may think proper, any part of my real estate sufficient to pay said debts," &c.

The question presented is, whether, after the live stock, the farm was, according to the will, next to be resorted to for the payment of the debts. The court below resolved this question in the affirmative, but the appellants insist that the personal estate should first be exhausted.

The decision appears to depend upon the meaning of the

word "*stock*," as used in that part of the will which directs, that "in case there is not a sufficiency of *stock* to pay my" (the testator's) "debts, then to dispose of so much of the land as will satisfy the balance." If, in thus using the term "stock," the testator intended to include his whole personal estate, then the court below erred; but if he meant by it only domestic animals, such as horses, cattle, sheep, swine, and the like, then the judgment should be affirmed.

We are of opinion that the term "stock" was used by the testator in its agricultural sense, as signifying domestic animals and nothing more. The context seems to forbid any larger definition. In this sense, obviously, the word was used in the preceding part of the same clause which enumerates the property bequeathed—"all the *stock*, household goods, furniture, provisions, and other goods and chattels" which might be on the farm at his decease. It is not to be supposed, without something to indicate it, that the same word was again used in the same clause, and, indeed, in another member of the same sentence, in a different sense. Strong support is also given to this construction by the circumstance that at the time the instrument was executed the proceeds of the sale of the domestic animals which were then owned by him, and upon the farm, would probably have constituted a fund sufficient for the purpose intended.

The observation of Lord COKE, that "wills and the construction of them do more perplex a man than any other learning, and to make a certain construction of them, this *excedit jurisprudentiæ artem*," is quite as true now as when it was uttered. Indeed, it is highly probable that in this country these instruments are more frequently prepared without the aid of professional skill and legal knowledge than in England, and consequently that the American courts are, and have been, peculiarly vexed with such questions. We do not, however, feel any difficulty in the present case. Settled rules of construction, based upon principles of obvious reason, seem to us to make it plain; thus, Mr. Jarman's

tenth rule: "courts will look at the circumstances under which the devisor makes his will—as the state of his property, of his family, and the like;" and the eighteenth, "that words occurring more than once in a will shall be presumed to be used always in the same sense, unless a contrary intention appear by the context, or unless the words be applied to a different subject;" and the twenty-first, "that the construction is not to be varied by events subsequent to the execution," &c.

Judgment affirmed, with costs.

J. B. Julian and *J. F. Julian*, for appellants.

W. A. Peelle and *H. C. Fox*, for appellee.

The State v. Vierling.

33 99
135 74
33 99
148 220

Liquor Law.—*Change of Venue.*—Where an appeal has been duly taken to the circuit court or court of common pleas from the decision of the board of county commissioners upon an application for license to retail intoxicating liquors resisted by remonstrance, such proceeding is a "civil action," and a change of venue may be taken as in other civil actions; the judgment of the court to which the venue is changed is final and without appeal therefrom; and a license duly granted thereunder to the petitioner will protect him against the penalty for retailing without license.

APPEAL from the Gibson Common Pleas.

Gregory, C. J.—The appellee applied to the board of commissioners of Gibson county for a license to retail intoxicating liquors in a less quantity than a quart at a time, under the provisions of the act of March 5th, 1859, "to regulate and license the sale of intoxicating liquors." 1 G. & H. 614, *et seq.*

A portion of the inhabitants of the township in which the business was to be conducted remonstrated against the granting of the license. A trial was had before the commis-

sioners, which resulted in favor of the applicant. The remonstrants appealed to the Gibson Circuit Court. On the application of Vierling, with objection on the part of the remonstrants, the venue was changed to the Daviess Circuit Court, in which a trial was had, resulting in favor of the applicant. A license was then issued to Vierling by the auditor of Gibson county, upon the former complying with the law. The question involved in this case is, did this license protect the appellee against the penalty for retailing without a license?

It is claimed, that the change of venue was without authority of law; that the Gibson Circuit Court was never ousted of jurisdiction; that the proceedings of the Daviess Circuit Court were void; that the appeal suspended the operation of the order of the commissioners.

By the act of 1859, *supra*, it is provided (sec. 3), that "any white male inhabitant desiring to obtain license to sell intoxicating liquors, shall give notice to the citizens of the township in which he desires to sell, by publishing in a weekly newspaper in the county, a notice, stating in the notice the precise location of the premises in which he desires to sell, at least twenty days before the meeting of the board at which the applicant intends to apply for license; or in case there is no such newspaper in such county, then by posting up written or printed notices in three of the most public places of the township in which he desires to sell, at least twenty days before the meeting of such board. And it shall be the privilege of any inhabitant of said township to remonstrate in writing against the granting of such license to any applicant on account of immorality or other unfitness."

This act is silent on the subject of appeal. This court, in 1860, in *Drapert* v. *The State*, 14 Ind. 123, held, that the remonstrants could not appeal from an order of the board of county commissioners granting a license under this statute.

The legislature in 1861 passed an act authorizing an ap-

peal by either party aggrieved, and providing that "either party to such appeal to the circuit court or court of common pleas, may demand and have a trial by jury in said circuit court or court of common pleas, and the decision or verdict of such jury shall be final and conclusive, and without appeal therefrom." Acts of 1861, p. 143. There is no provision in this act for an appeal bond.

In *Wright, Auditor of Marion County*, v. *Harris*, 29 Ind. 438, decided in 1868, there was an attempt by the remonstrants to appeal without giving bond from an order granting a license. It was contended in that case, that no bond was required by the act of 1861, *supra*, and that that was the only statute authorizing appeals in such cases. But this court held otherwise, overruling the case of *Drapert* v. *The State;* and in doing so say, "But it is argued that the bond would be an idle form, for the reason that the remonstrants appealing are not liable for costs, if defeated on the appeal. And *Drapert* v. *The State* is cited in support of the proposition. If the question is, as was there said, merely between the applicant and the county, then it might possibly follow that not the remontrants appealing, but the county, must pay costs when the appeal is unsuccessful. Indeed, we are advised that it is the practice in some parts of the State to render judgment for costs in such cases against the county, thus putting it in the power of a single citizen sometimes to prosecute a hopeless and groundless appeal at the expense of the county treasury, and without any risk of himself. But regarding the reasoning in *Drapert* v. *The State*, *supra*, as essentially unsound, as we do, this absurd result is avoided."

Molihan v. *The State*, 30 Ind. 266, holding that an appeal by remonstrants suspended the operation of the order of the board of county commissioners, went upon the ground that the applicant was secured in his right by the appeal bond required by law. Such bonds have two conditions, first, "for the due prosecution of the appeal;" second, "for the payment of all costs, if the same shall be adjudged against said appellant." The breach of the first, as well as that of

the second, will give a right of action to the injured party to the extent of that injury.

These rulings go on the ground that there are in such cases substantial rights involved. On the one hand, the applicant, if a white male inhabitant of the township in which the business is to be conducted, of good character and fit to be trusted therewith, upon complying with the law, has the right to a license to retail intoxicating liquors in a less quantity than a quart. On the other hand, the inhabitants of such township have a right to be protected from the evil consequences of granting this privilege to unfit persons.

Is, then, such a proceeding a "civil action," within the meaning of the code? The code provides, that "there shall be in this State, hereafter, but one form of action for the enforcement or protection of private rights, and the redress of private wrongs, which shall be denominated a civil action." 2 G. & H. 33, 34, sec. 1.

We are clearly of the opinion, that the proceeding of the appellee, commenced before the board of commissioners of Gibson county, and taken by appeal to the Gibson Circuit Court, was a civil action, within the meaning of the code, and that therefore a change of venue was authorized by the law allowing such changes in civil actions. It follows, that the judgment of the Daviess Circuit Court, under the act of 1861, was final, and that no appeal therefrom will lie to this court.

The license was a full protection to the appellee for the act charged in the information.

Judgment affirmed, with costs.

FRAZER, J., absent.

M. W. Pearse, *D. F. Embree*, and *D. E. Williamson*, Attorney General, for the State.

A. C. Donald and *C. A. Buskirk*, for appellee.

Haun *v.* The Mulberry and Jefferson Gravel Road Company.

Corporation.—*Subscriptions.*—*Pleading.*—*Gravel Road.*—In a suit on a subscription to the capital stock of a gravel road company, made to the articles of association, prior to the organization of the company, there was no averment in the complaint that the articles of association had been filed in the office of the recorder of the county in which the road was located, as required by the statute authorizing the organization of the company.

Held, that the complaint was bad on demurrer.

Same.—*Statute Construed.*—By the terms of a subscription to the capital stock of a gravel road company, the stock subscribed was payable in such *instalments* as might be called for or required by the directors of the company, and at such times and in such manner as they might direct. The statute under which the company acted authorized the directors to require payments from the subscribers to the capital stock of the sums subscribed by them at such times and in such proportions and on such conditions as they should see fit.

Held, that the directors might require the whole subscription to be paid at one time, or might divide it into such instalments as to them might seem proper.

APPEAL from the Clinton Common Pleas.

Elliott, J.—This was a suit by the Mulberry and Jefferson Gravel Road Company against Haun, the appellant, to recover four hundred dollars, for sixteen shares, of twenty-five dollars each, subscribed by Haun to the capital stock of the company.

The stock was subscribed to the articles of association preliminary to the organization of the company.

A demurrer to the complaint was overruled, to which the appellant excepted. Issues were then formed, the trial of which resulted in a finding and judgment for the appellee.

The first error assigned raises the question of the sufficiency of the complaint on demurrer. The suit being on a subscription to the capital stock, made to the articles of association, prior to the organization of the company, it was necessary that the plaintiff should show that the requirements of the statute authorizing the organization of the company had been substantially complied with. *Wert* v.

The Crawfordsville, &c., Turnpike Co., 19 Ind. 242; *Williams* v. *The Franklin Township Academical Association*, 26 Ind. 310. The statute provides, that "whenever the stock subscribed amounts to the sum of five hundred dollars per mile of the proposed road, copies of the articles of association shall be filed in the office of the recorder of each county through which the road is to pass, and shall from that time be a corporation known by the name assumed in its articles of association." 1 G. & H. 474, sec. 1.

In the case at bar, there is no averment in the complaint that the articles of association had been filed in the office of the recorder of Clinton county, in which the road is located. The complaint was therefore clearly defective, and the court erred in overruling the demurrer.

By the terms of the subscription, the stock subscribed was payable in such instalments as might be called for or required by the directors of the company, and at such times and in such manner as they might direct. It is alleged in the complaint, "that after repeated previous orders and notices of the same tenor and effect, and after most of her stock subscription had been paid, the company, on the 18th day of April, 1868, by her directors, ordered and directed that all unpaid stock subscriptions to the company, should become due and payable at the office and residence of the treasurer, on or before the fourth day of June, 1868." A notice of which order was duly published, &c.

It is insisted, that the complaint is bad in not alleging that payment of the stock was required by the directors to be made in several instalments, with the amount of each, and the times of payment thereof, and that it was not in the power of the directors to require the payment of the whole amount subscribed, at one time. The statue under which the company assumes to act, authorizes the directors to require "payments from subscribers to the capital stock of the sums subscribed by them, at such times and in such proportions, and on such conditions as they shall see fit." 1 G. & H. 477, sec. 11. Under this provision of the statute,

subscriptions to the capital stock may be required to be paid in instalments, and such perhaps is the usual mode of payment adopted by the directors of such companies; but we cannot construe the provision as rendering it imperative on the directors to require payment by instalments. It seems to invest the directors with a full discretionary power in determining the time and manner of payment, and they may require the whole subscription to be paid at one time, or may divide it into such instalments as to them may seem proper. This is the only practical construction of which the provision is susceptible.

We do not deem it necessary to examine the question presented upon the action of the court in sustaining a demurrer to the third and fourth paragraphs of the answer. The complaint does not show that the amount of the capital stock was increased by order of the board of directors after the organization of the company, but that fact appears from the evidence, and it is involved in the questions arising upon the demurrer to the third and fourth paragraphs of the answer; and as the judgment must be reversed for the want of a sufficient complaint, and should the complaint be amended in the court below, by proper averments, the questions now presented on the third and fourth paragraphs of the answer may not again arise.

The judgment is reversed, with costs, and the cause remanded, with directions to the common pleas court to sustain the demurrer to the complaint, and with leave to both parties to amend their pleadings.

R. P. Davidson, for appellant.

J. N. Sims and *L. McClurg*, for appellee.

SMITH *v.* HUNTER.

83	106
157	98
83	106
158	542

PROMISSORY NOTE.—*Pleading.*—*Assignment.*—In a suit upon a promissory note by an assignee, the fact of the assignment being alleged in the complaint, a surety cannot object to the complaint because a copy of the assignment is not set out.

SAME.—*United States Revenue Stamp.*—Suit on a promissory note executed November 20th, 1866. The complaint did not allege that the instrument was stamped, and no copy of a stamp was set out.

Held, that this did not render the complaint insufficient.

SAME—*Collateral Security.*—Where a creditor has obtained a judgment, which is collectable, on a note held by him as collateral security, he will not be thereby prevented from availing himself, to the extent of his entire claim, of another note held by him as collateral security for the same claim.

APPEAL from the Ripley Common Pleas.

RAY, J.—Hunter sued Smith and one Voltz on a note executed November 20th, 1866, by Voltz as principal and Smith as surety, payable to the order of Yater & Bro., and which the complainant alleges was assigned by said payee to the plaintiff.

It is objected that a copy of the assignment is not set out. The fact is averred, and the action against Smith is not on the assignment. Again, it is objected that the instrument is not alleged to be stamped, and no copy of a stamp is set out. It has been held, in *Lynch* v. *Morse*, 97 Mass. 458, and *Carpenter* v. *Snelling*, *Id.* 452, and in *Hanford* v. *Obrecht*, 49 Ill. 146, that the act of Congress on this subject controls alone the courts of the United States. But however this may be, it is clear, that as the act in force when this note was executed only applied to instruments where the stamp was omitted with intent to defraud the government, no allegation anticipating such a defense is required. The complaint was sufficient.

A second paragraph of answer was filed as a partial defense. It alleged that the plaintiff held the note in suit as collateral security for a debt of thirteen hundred dollars and that the appellant was simply a surety on said note;

that the plaintiff received as collateral security other good notes at the same time, and had obtained a judgment upon one of them for eight hundred dollars, which was collectable. A demurrer was sustained to this paragraph. The ruling was correct. Until the debt was paid the plaintiff could avail himself of any and all of his securities to the extent of his claim.

Judgment affirmed, with six per cent. damages and costs.

E. P. Ferris and *H. T. Lipperd*, for appellant.

J. D. Haynes, for appellee.

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33 107
141 682

Whitney and Others *v.* Ragsdale, Treasurer.

Tax.—*Bank Stock.*—*National Bank.*—*Statute Construed.*—The act of March 15th, 1867 (Act 1867, p. 216), authorized the collection of a tax on shares of capital stock owned in National banks located in this State, assessed in the manner provided for in said act, for state and county purposes, for the year 1867.

Same.—*Constitutional Law.*—The fact that under said act the stockholder, in the listing and valuation of his stock, is represented by an officer of the bank, does not render the act in conflict with the provision of the constitution requiring a uniform and equal rate of assessment and taxation.

Same.—*Residence of Stockholder.*—The requirement of said act, that the stock shall be taxed at the place where the bank is located, is not invalid where the owner of the stock lives in another county or state.

Same.—*Officer of National Bank.*—*Authority of State Over.*—The fact that said act provides that an officer of the bank shall list the stock, does not render the act ineffectual in the case of National banks.

APPEAL from the Johnson Circuit Court.

Ray, J.—The appellants filed their complaint in the court below, against the appellee, on the 29th of July, 1868. It alleged, that the plaintiffs were stockholders in the Second National Bank of Franklin, located at Franklin, Johnson county; the bank being organized under the National Bank Act of Congress. The amount of stock held by the plaint-

iffs, respectively, is stated; that from January 1st, 1867, to the filing of the complaint, all the capital of the bank was invested in United States bonds and stocks, except the banking house, on which all taxes had been paid; that under color of the act of the Legislature, of March 15th, 1867, the board of commissioners of the county assessed a tax, for state and county purposes, on their stock in bank for the year 1867; that the assessment was placed on the tax duplicate; and that pursuant to precept placed in his hands, the treasurer was proceeding to collect the tax, with penalties, etc., by levy and sale of plaintiffs' property; that none of the plaintiffs were residents of Johnson county, E. G. Whitney, Wm. B. Whitney, Maria Whitney, and Thomas Reid, residing in Jefferson county, and all the others being citizens of Kentucky; that such had been their respective residences since prior to January 1st, 1867.

Prayer for perpetual injunction.

The defendant demurred to the complaint.

The demurrer was sustained by the court.

Exception taken by plaintiffs.

The plaintiffs abiding their complaint, final judgment against them went on the demurrer.

The only question in this case is, does the Act of March, 15th, 1867 (Acts 1867, p. 216), authorize the collection of such tax?

The appellants contend that the act should be construed as having prospective operation only, and not as authorizing any such tax for the year 1867, because it has been the course of legislation in this State to impose all taxes for the year upon property declared subject to it, as the same exists or is owned on the 1st day of January in each year. That on the day named this property was exempt from tax, and therefore worth more than if it had been taxed. Giving the act in question a retrospective operation would take away this additional value.

But it cannot reasonably be insisted that this additional value was not subject to the pleasure of the legislature and

liable at any moment to be taken away by the imposition of a tax. The argument results then in this, that as the legislature had not heretofore subjected property free from tax on the 1st day of January to such a burden at a subsequent date, we are therefore not to place such a construction upon this act as would result from a change of legislative practice.

To this may be answered, that the constitution of the State, article ten, section one, requires the legislature to "prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal," and that, therefore, where there has been a neglect of the legislature to comply with this requirement and impose the tax at the usual time, it is our clear duty to aid by reasonable construction any attempt by that body to supply such omission. Nor can it be said that such a construction deprives the owner of property thus omitted of any right. All property is by the constitution subject to this public burden, and it is also equitable that it should support its proportionate share.

That the tax was intended to apply for the year 1867, is evident from the language employed. The second section of the act requires the president or cashier of the bank to deliver a statement of the names and amount of interest of each stockholder to the proper county auditor on or before the fifteenth day of March in each year. The act was approved and went in force on that day. To enable bank officers to comply with the law for that year however, the second section of the act declares, that "the sworn statement, required by the second section of this act, *may* be made for the year 1867, at any time on or before the first day of May, but for subsequent years *shall* be made within the time required by the said second section."

To construe the word "may" as simply permissive, would render the provision not only idle, but absurd. It would be an insult to the legislature, to suppose that they intended

to allow each bank to elect whether or not its stockholders should be taxed.

The next objection is to the law itself. While it is admitted that this law is within the act of Congress, it is contended that it is in conflict with a provision contained in the section of the state constitution already cited, requiring "a uniform and equal rate of assessment and taxation." The specification is, that as to the listing and valuing of all his other personal property, each owner is allowed to attend to it himself, but as to National bank stock, he is represented by an officer of the bank. But as to real estate, he makes no return or estimate of value. In that case, as in this, such returns and estimate are made by another person under oath. But this objection was disposed of in the case of *The Louisville & N. A. R. R. Co.* v. *The State, ex rel. McCarty, &c.*, 25 Ind. 177, where the point was made, that where the law provided a special method for the appraisement of the real estate belonging to a railroad, it was in contravention of the constitutional provision in question, and was, therefore, void. But this court, in deciding that case, sustaining the law, said: "The constitution does not require a uniform method of valuation of property, but only 'such regulations as shall secure a just valuation for taxation of all property, both real and personal.' The legislature must use a discretion as to the best method of securing a just valuation of property, and unless the method adopted be clearly inadequate to secure that result, we can not question its action."

It is objected again, that the act requires the stock to be taxed where the bank is located, irrespective of the residence of the owner. It is not contended that this violates any act of Congress, but that it conflicts with the "general revenue system of the State." But we are referred to no provision of the constitution which prohibits the legislature from declaring that all National bank stock shall be taxed at the place where the bank is located, and that all shares in other corporations shall be taxed where the own-

ers reside. The rate of assessment and taxation is still uniform and equal. That some of the stockholders are non-residents of the State, is no reason for this exemption from taxation. "It is not necessary that a person, to be amenable to the taxing power of the state, shall be a citizen of the state, or domiciled within it." *Board of Supervisors* v. *Davenport*, 40 Ill. 197.

The final fault found with the act in question is, that it is ineffectual, because it provides that an officer of the bank shall list the stock. It is contended, that such officer is "an officer of one of the fiscal agents of the General Government," and therefore the duty cannot be imposed upon him. As the duty is not inconsistent with the trust imposed upon him as such officer of such fiscal agent, we are not prepared to admit his exemption from state authority by virtue of his position.

In this case, however, the tax has been assessed, and whether or not the act provides for extreme cases is not necessary for our consideration now.

The judgment is affirmed, with costs.

T. A. Hendrick, *O. B. Hord*, *A. W. Hendricks*, and *C. E. Walker*, for appellants.

T. W. Woollen, *D. D. Banta*, and *C. Byfield*, for appellee.

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33 111
143 670

Strader and Others *v.* Manville, Treasurer.
Law and Others *v.* Same.
Monroe, Treasurer, *v.* Strader and Others.

Tax.—*Bank Stock.*—*National Bank.*—The capital stock of a National bank originally organized under the act of Congress of 1863, is not exempt from taxation under the act of our Legislature of March 15th, 1867 (Acts 1867, p. 216).

Same.—*Tax Duplicate.*—*Auditor and Treasurer.*—Where the assessment un-

der said act of 1867 has been omitted by the county auditor, and he has delivered the tax duplicate to the treasurer, the latter should insert it, but if a correct assessment be made by the auditor after such delivery and acted upon by the treasurer, it is sufficient.

SAME.—*Injunction.*—Where the correctness of an assessment so made by the auditor, in the number of the shares and the amount of the tax, was not questioned;

Held, that an injunction would not lie to restrain the collection of the tax because, the officers of the bank having failed to deliver to the auditor the statement provided for in the second section of the act of 1867, he did not summon them before him and obtain from them such statement.

SAME.—*Residence of Stockholder.*—The capital stock of a National bank, liable under the act of 1867 to taxation at the place where the bank is located, is not also liable under the general law to taxation again at other places where the stockholders reside.

APPEAL.—*Default.*—Where a judgment has been taken against a defendant by default, on a complaint which does not state facts sufficient to constitute a cause of action, he may appeal to the Supreme Court, assigning the insufficiency of the complaint as error, without having made a motion for relief below.

APPEAL from the Jefferson Circuit Court.

RAY, J.—The only points made in either of the above cases not already decided in *Whitney* v. *Ragsdale, Treasurer*, at the present term, *ante*, p. 107, will be stated as they are ruled.

The counsel have applied one brief to the cases, and one opinion will therefore be pronounced.

First, the banks were organized under the act of 1863, which did not in terms authorize state taxation. But the act of 1864 repealed the former act, as was provided in the act of 1863 might be done, and continued the existence of the banks already organized under the act of 1863. 2 Brightly's Digest, 72, sec. 65.

Second, the assessment was placed upon the tax duplicate by the auditor after he had delivered it to the treasurer. It was made the duty of the auditor, by the act of 1867, to place the tax upon the duplicate, and the act does not in terms limit the time within which this may be done. Under the general law, it is made the duty of the treasurer to add omitted names, and we have held that where this duty

was performed by the auditor and acted upon by the treasurer, it was sufficient. *Rieman* v. *Shepard, Treasurer*, 27 Ind. 288. This property being declared taxable, under the general law the treasurer should have inserted it if it were omitted by the auditor. Here it is not denied that the amount is correct.

Third, the names of stockholders were not returned by the bank officer, and the auditor did not, as he was empowered, summon them before him and from them obtain such a statement. Still, as the correctness of the assessment, in number of shares and amount of tax, is not questioned, a court will not grant the use of an extraordinary remedy issued by a court of equity, to aid the parties in avoiding an amount equitably and, in our view, legally due. The third section of the act of 1867, p. 216, authorizes the auditor to make such investigations at the expense of such bank as may enable him to obtain the information required. This does not limit him to an examination of the officers of the bank.

The objection is made that the owners of stock would, under this, be liable to taxation at the point where the bank is located and under the general law again at their places of residence. When the general law was passed, this class of stock was not taxed, and is now only liable to taxation at the point where the bank is located.

The judgment in the case of Strader *et al.* *v.* Manville, Treasurer, is affirmed, with costs.

C. E. Walker, *W. S. Roberts*, *T. A. Hendrick*, *O. B. Hord*, and *A. W. Hendricks*, for appellants.

H. W. Harrington and *C. A. Korbly*, for appellee.

The judgment in Law *et al.* *v.* Manville, Treasurer, is affirmed, with costs.

C. E. Walker, *W. S. Roberts*, *T. A. Hendricks*, *O. B. Hord*, and *A. W. Hendricks*, for appellants.

H. W. Harrington and *C. A. Korbly*, for appellee.

In Monroe, Treasurer, by Manville, his successor in office,

v. Strader *et al.*, judgment was taken by appellees by default. The error assigned in this court is, that the complaint does not state facts sufficient to constitute a cause of action. It is objected, that after default, a motion must be made to set the judgment aside before the appeal can be prosecuted. That is true where some action by the court below might have been had to avoid some technical objection, as to an imperfect return of service, or the like. But the rule does not have a general application. *Abdil* v. *Abdil*, 26 Ind. 287; *Cochnower* v. *Cochnower*, 27 Ind. 253. If a motion to set aside this default were granted, still the appellant could not be required to raise this question by demurrer, and his failure to do so would not waive the objection. The complaint in this case is subject to the same objections as in *Whitney et al.* v. *Ragsdale*, *supra*.

The cause is reversed and remanded, with directions to the court below to set aside all proceedings subsequent to the complaint.

H. W. Harrington and *C. A. Korbly*, for appellant.

C. E. Walker, for appellees.

KISTNER *v.* SINDLINGER.

PARTNERSHIP.— *Individual and Partnership Debts.— Mortgage.*—Certain real estate being owned by a firm composed of two partners and used in the business of the partnership, one of them alone executed a mortgage on an undivided half of it, to secure the payment of his individual debt. Afterwards said real estate was sold at sheriff's sale under a judgment rendered, after the execution of said mortgage, against the partners, for a debt of the firm contracted before the execution of the mortgage.

Held, that the mortgagee was not entitled to foreclose his mortgage as against the purchaser at the sheriff's sale, without first redeeming or offering to redeem from the sheriff's sale that part of the real estate covered by said mortgage.

APPEAL from the Shelby Common Pleas.

This was an action by Philip F. Sindlinger against Charles Schreiber and Adam Kistner, to foreclose a mortgage executed on the 26th day of January, 1867, by Schreiber to Sindlinger, on an undivided half of lot seventy-four, "together with all the buildings appertaining thereto," in Fletcher and McCarty's addition to the town of Shelbyville.

The mortgage was given to indemnify Sindlinger as the surety of Schreiber on a note executed by them to one Alfred Major, on the 23d day of January, 1867, for three hundred and fifty dollars, payable twelve months after date. It is averred in the complaint, that Sindlinger had been compelled to pay on said note $253.90; and also, that the defendant Kistner, on the 23d day of May, 1868, had become the purchaser, at sheriff's sale, on executions against said Schreiber, of the mortgaged premises; that the judgments on which said executions were issued, were rendered subsequent to the date of said mortgage.

Kistner in a separate answer set up a special defense, to which a demurrer was sustained, and he excepted. Schreiber answered by denial. The issue made by his answer was tried by the court, and there was a finding, and final decree of foreclosure.

Kistner alone appeals.

ELLIOTT, J.—It is insisted here, for the appellant, that the facts alleged in his answer constituted a valid bar to the foreclosure of the mortgage, and that the court therefore erred in sustaining the demurrer to it. This is the only question in the case.

The facts presented by the answer are, in substance, as follows: In 1866, the defendant Schreiber and one Vogle were partners in the trade and business of manufacturing beer and ale at Shelbyville, in said county of Shelby, and as such partners purchased the whole of the lot described in the complaint and erected thereon a brewery and place of business for said partnership, and in December, 1866, as such partners, they purchased of the appellant and one

Renner, a copper brewing kettle, and other articles and implements used in their business of brewing, for the price and sum of twelve hundred dollars, and paid thereon the sum of four hundred and sixty-six dollars, and thereupon set up and placed said kettle and other articles in their said partnership brewery on said lot; that afterwards, on the 10th day of January, 1867, said Schreiber and Vogle executed to said Kistner and Renner their partnership note for seven hundred and thirty-four dollars, payable in one year thereafter, being the balance of the price and purchase-money for said brewing kettle and other articles; that said note being unpaid, said Kistner and Renner brought suit thereon, and on the 2d day of March, 1868, recovered a judgment thereon against said Schreiber and Vogle, in the Court of Common Pleas of Shelby county, for the sum of $743.13, with costs of suit; that afterwards, on the 18th of March, 1868, an execution was duly issued on said judgment and placed in the hands of the sheriff of said county, who levied the same on the lot described in the complaint, and after giving due notice of the time and place of sale, offered and exposed the whole of said lot for sale at public auction, to satisfy said execution and divers other executions then in his hands against said Schreiber and Vogle and then and there sold the same to the appellant, for the use of himself and said Renner, for the sum of seven hundred dollars, which he then paid, and of which there was applied to the execution in favor of said Kistner and Renner, the sum of $246.93, leaving the residue thereof unpaid; that ever since the sale of said lot, the said firm of Schreiber and Vogle, and each of the members thereof, have been and are insolvent, having no other property or effects subject to execution; that the mortgage mentioned in the complaint was executed by said Schreiber long after said debt due said Kistner and Renner was contracted by said firm of Schreiber and Vogle, and was given by said Schreiber alone, on an undivided half of said lot, to secure the private, individual debt of said Schreiber, and not for or on

account of any debt due from or contracted by said partnership of Schreiber and Vogle. Nor has the said plaintiff or any other person redeemed or offered to redeem said lot from said sheriff's sale. Wherefore, he says that the plaintiff is not entitled to a judgment or decree of foreclosure of said mortgage against said appellant, &c.

It is well settled, that one partner cannot apply the partnership assets to the payment of his individual debt, without the consent of his co-partner. And so, where a partnership is dissolved by the death or bankruptcy of one of its members, the partnership effects must be first applied to the payment of the partnership debts, before creditors of the individual members of the firm can demand payment out of such effects. *Holland* v. *Fuller*, 13 Ind. 195; *Weyer* v. *Thornburgh*, 15 Ind. 124. But this rule does not apply to cases where the partnership still exists and the partners have the legal right to dispose of their property as they please. Whilst such is the case, the partnership property may be applied, by the act or consent of both the partners, to the individual debt of one of them. The rule is only applicable when the principles of equity are brought to interfere in the distribution of partnership property among the creditors. *M'Donald* v. *Beach*, 2 Blackf. 55; *Frank* v. *Peters*, 9 Ind. 343; *Shæffer* v. *Fithian*, 17 Ind. 463.

But a sale by one partner of his interest in real or personal property held by and for the use of the firm, does not affect the right of the other partner to have it subjected first to the payment of the partnership debts. Indeed, such a sale only confers on the purchaser the rights or interest of the vendor in the property after the settlement of the partnership and the payment of all its liabilities.

Here, the answer shows that the whole lot was purchased for and used by the partnership, for the sole use of the firm, on which they erected their partnership brewery, and whilst it was so used and held, and after the debt due to Kistner and Renner was contracted by the firm, Schreiber alone, executed the mortgage sought to be foreclosed, to secure

the payment of his individual debt, on an undivided half of the lot and the buildings thereon.

The mortgage was not executed by or in the name of the partnership. It is the individual act of Schreiber, one of the partners, and only created a lien on his interest in the lot, subject to the liabilities of the firm; and the appellant having become the purchaser of the lot under a judgment against the partners for a debt of the firm, his claim is paramount to that of the appellee under the mortgage.

Kistner having purchased the lot at sheriff's sale on judgments against the firm, which, in equity, were paramount to Sindlinger's mortgage, the latter was not entitled to a foreclosure of his mortgage, as against Kistner, without first redeeming, or offering to redeem, that part of the lot covered by the mortgage from the sheriff's sale, which, it is averred, he did not do.

The answer was good, and the court erred in sustaining the demurrer.

Judgment as to Kistner reversed, with costs, and the cause remanded, with direction to the court to overrule the demurrer, and for further proceedings not inconsistent with this opinion.

J. Schwartz, for appellant.

The State, on the Relation of Farnham, *v.* Willis and Others.

Sheriff.—*Execution.*—*Levy.*—A sheriff, holding an execution for five hundred and fifty dollars against the property generally of two persons, levied it in good faith on certain real estate worth over sixteen hundred dollars, there being an incumbrance of one hundred dollars thereon, the title in fee to an undivided one-half thereof being in one of the execution-defendants, and the equitable title to the other half being in him also, it being held in trust for him. There had been a sale of the land for taxes, but the sale was in-

regular and void, and there was no reasonable doubt concerning the title. When first called on, the execution-defendants did not designate any property to be levied upon, but before a levy was made they designated this real estate, they having at the time, subject to execution, also other real estate worth ten thousand dollars, and a large amount of personal property, upon which latter the plaintiff had directed the sheriff to levy. The sheriff failed to sell the land for want of bidders.

Held, that the sheriff and his sureties were not liable to suit on his official bond, for failing to levy on the personal property as directed.

APPEAL from the Steuben Circuit Court.

FRAZER, J.—A sheriff holding an execution for about five hundred and fifty dollars against the property generally of two persons, levied it, in good faith, on real estate worth over fifteen hundred dollars above a small incumbrance, of one hundred dollars, the title in fee in an undivided half thereof and the equitable title to the other half being in one of the execution-defendants and held in trust for him. This property was designated for levy by the execution-defendants, who had, at the same time, other real estate worth ten thousand dollars, and also a large amount of personal property, subject to the execution, upon which latter the plaintiff had directed the sheriff to levy. There had been an irregular and void sale of this land for taxes. The sheriff failed to sell the land for want of bidders. The question before us is, whether the sheriff and his sureties were liable to suit upon his bond, for failing to levy on the personal property, as directed.

The levy seems to have been ample, and the statute gives the execution-defendant the right to designate the property, whether real or personal, which shall first be taken, if there be no reasonable doubt of the title; and the case before us does not disclose any foundation for such a doubt. 2 G. & H. 241, sec. 441, *et seq.*

The sale for taxes, obviously void, was not enough to put the title in doubt, nor, indeed, is this pretended. The case is presented here upon the ground, mainly, that the duty of the sheriff, was to allow the plaintiff in the execution to designate the property to be levied upon, inasmuch as the

defendants did not do so when first called upon, though they finally did before a levy was made. We do not concur in that proposition.

Another proposition, to wit, that the sheriff should not have levied upon incumbered real estate, equally fails to accord with our views.

Other questions are argued, but we do not feel called upon to express an opinion upon them, for the reason that they cannot, in the state of this record, be available to reverse the judgment. The whole merits of the controversy depend upon the facts specially found by the court.

Affirmed, with costs.

D. E. Palmer and *J. A. Woodhull*, for appellant.

J. J. Best, and *C. A. O. McClellan*, for appellees.

Ross and Others *v.* Crews and Others.

Injunction.—*New Trial as of Right.*—A judgment was rendered for the possession of real estate, and the defendant, having paid the costs, filed a complaint as a motion for a new trial as of right, under the statute, and prayed an injunction to restrain the further prosecution of the judgment; and the judge, in vacation, having overruled a demurrer to the complaint, granted a temporary injunction. The complaint did not give any description of the premises, was not verified by affidavit, and it did not appear therefrom that a writ of possession had been issued, or that any order or direction had been given therefor, or that the judgment-plaintiff was using any means to obtain possession.

Held, that the granting of the injunction was error.

APPEAL from an order of the judge of the Knox Circuit Court, in vacation, granting a temporary injunction.

Elliott, J.—It appears by the complaint, filed by the appellees, that on the 27th day of February, 1869, the appellants recovered a judgment in the Knox Circuit Court against the appellees, for the recovery of the possession of

certain real estate; that on the 1st day of March, 1869, the appellees paid all the costs in said cause, and thereupon filed the complaint as a motion for a new trial, under the statute, without cause, and prayed for an injunction against the appellants, restraining them from the further prosecution of the judgment, &c. The appellants appeared before the judge at chambers, and, by way of demurrer, objected to the complaint, on the ground that it did not state facts sufficient to authorize an injunction. The objection was overruled, and the judge thereupon granted an order restraining the appellants from sueing out a writ of possession on said judgment, or otherwise disturbing the appellees in the possession of the premises, until the further order of the Knox Circuit Court.

The appeal is from this ruling and order of the judge in vacation.

We think the objection to the complaint was well taken, as it sought an injunction, which was the only question that could be presented to the judge at chambers. The pleading was proper enough as a mere motion for a new trial, to be disposed of by the court in term time. A case might doubtless be presented, based upon a motion for a new trial, in such an action, where it would be proper for the judge in vacation to restrain the execution of the writ of possession, but we do not think the complaint before us presents such a case. First, it fails to give any description of the premises involved in the suit. It is stated in the complaint that the "lands are described in the affidavit of the plaintiff Crews, which is made a part hereof," but no such affidavit is annexed to the complaint, or appears in the record.

Second, the statute requires that the complaint, in such cases, or so much thereof as pertains to the acts or proceedings to be enjoined, shall be verified by affidavit. 2 G. & H. 133, sec. 138. The record before us does not show that any such affidavit was made.

Third, it does not appear by the complaint that a writ of possession had been issued on the judgment, or any order

or direction given therefor, or that the appellants were using any means whatever to procure the possession of the property. In the absence of any such allegations, the complaint fails to show either a necessity or reason for an injunction.

The appellees did not appear in this court, and the case was submitted on default. Subsequently, they filed a written motion to dismiss the appeal, on the ground that no sufficient abstract of the record was filed, and for the further reason that but one copy of an abstract was filed, instead of two, as required by the rule of this court.

The record is a brief one, and we think the abstract was sufficient, and the motion to dismiss because only one was filed comes too late, after the submission of the cause.

The order of injunction is reversed, with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

F. W. Viehe, for appellants.

J. C. Denny and *G. G. Reily*, for appellees.

Robinson *v.* Jamison.

Supreme Court.—*Evidence.*—The Supreme Court will not interfere with a finding because it is contrary to the weight of conflicting evidence.

Same.—*Complaint.*—*Demand.*—*Verdict.*—The Supreme Court will not reverse a judgment, in a cause in which there is an answer, because the amount of the finding is greater than the amount claimed in the complaint.

APPEAL from the Howard Common Pleas.

Gregory, C. J.—This was a suit by the assignee against the maker, on a promissory note payable to one Jones.

The defense was failure of consideration, payment to Jones before notice of the assignment, and breach of covenants in a deed executed by Jones and wife to the defend-

ant for real estate, the purchase-money of which was the consideration of the note.

Reply by way of estoppel, that at the time the plaintiff was negotiating for the note, he called on the defendant to know if he had any defense to the note, and that the latter told the former he had not, and that the note was all right, and that he would pay it. The issues were submitted to the court; finding for the plaintiff for the amount of the note, including the interest; motion for a new trial overruled.

It is claimed in argument, that the evidence does not sustain the finding.

Whatever we might think of the weight of the evidence, the finding is not so clearly wrong as to authorize this court, under the rule of law on this subject, to interpose.

The only other question presented by the argument for the appellant is, that the amount claimed in the complaint was only $1,400, whilst the amount found was $1,436.84, and therefore erroneous.

This point was met, and decided adversely to the appellant, in *Webb* v. *Thompson*, 23 Ind. 428.

Judgment affirmed, with costs.

G. Holland and *C. C. Binkley*, for appellant.

N. R. Lindsay and *J. A. Lewis*, for appellee.

The Jeffersonville, Madison, and Indianapolis Railroad Company *v.* Ghon.

APPEAL from the Bartholomew Circuit Court.

Elliott, J.—Ghon sued, and recovered a judgment against the railroad company, for the value of a heifer, killed by a locomotive on the track of the company's road, at a point where the road was not fenced.

The case is brought to this court on the evidence. The finding below is objected to on the ground that the company was not required to fence the road at the place where the heifer was killed. The jury that tried the case in the circuit court found otherwise, and we think the evidence sustains the finding.

The judgment is affirmed, with ten per cent. damages and costs.

S. Stansifer, for appellant.

Bowser and Another *v.* Palmer.

Promissory Note.—*Attorney's Fees.*—*Evidence.*—On the trial of an action on a promissory note which provided for the payment of "all costs and attorney's fees for collection," if the note should not be paid at maturity, the only evidence introduced was the note sued on.

Held, that there could be no finding for attorney's fees.

APPEAL from the Allen Common Pleas.

Suit by the appellee against the appellants on a promissory note for nine hundred and thirty-two dollars, with interest, and "all costs and attorney's fees for collection, if said note is not paid at maturity."

Answer, the general denial.

On the trial, the only evidence introduced was the note.

The finding was for the plaintiff, and included fifty dollars for attorney's fees.

The defendants filed a motion for a new trial for the reasons: "1st. That the finding of the court is not sustained by the evidence.

"2d. That the finding of the court is contrary to law.

"3d. That the court erred in making an allowance of attorney's fees in favor of said plaintiff, and that the same is not sustained by the evidence, and is contrary to law."

The motion was overruled, and the defendants excepted; and judgment was rendered on the finding.

FRAZER, J.—The judgment below cannot stand. There was no evidence whatever upon which to base the finding of the court for attorney's fees.

Reversed and remanded, with direction to grant a new trial.

J. A. Fay, for appellants.

W. H. Coombs and *W. H. H. Miller*, for appellee.

GOINGS *v.* WHITE.

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FRAUD.—*Pleading.*—A complaint for damages for fraudulent representations by the vendor in the sale of land must contain an averment that the plaintiff relied upon the representations. The want of such averment cannot be supplied by a recital of evidence which might justify a presumption that the representations were relied upon, unless such evidence be conclusive of the fact.

APPEAL from the Delaware Circuit Court.

Suit by the appellee against the appellant. The complaint was in two paragraphs. The defendant filed a separate demurrer to each, for want of sufficient facts, which the court overruled, and the defendant excepted.

The first paragraph alleged, that the parties resided in Delaware county, in this State; that on the 25th of February, 1867, the defendant owned forty acres of land, described, in Hardin county, Iowa, and the plaintiff owned some real estate in Selma, in said Delaware county; that the plaintiff had never seen said Iowa land and had no knowledge of it except such as he derived from the defendant; that the plaintiff and defendant exchanged said property, the plaintiff conveying to the defendant, and the de-

fendant conveying to the plaintiff; that the defendant's land was taken at five hundred dollars, the price agreed upon; that at the time of the treaty between the parties, the plaintiff told the defendant that he, the plaintiff, knew nothing about the land, and if he took it, he must take it at the defendant's statements, and must rely upon the defendant's representations about the quality and value of the land; that the defendant assured him that he would find the land just as he, the defendant, stated it; that the defendant assured him that the land lay within two and one-half miles of Eldora, the county seat of said Hardin county; that said town was one-third larger than Muncie, Indiana; that said land was dry and tillable; that twenty acres of it was broken, and fenced on two sides; that the defendant's brother had entered it for him; and that it was worth five hundred dollars; when, in truth, said land lies twenty miles from Eldora, which is a town not one-fifth the size of Muncie; that said land is not dry, tillable land, but is all low, wet, swampy land; that it cannot be drained, and cannot be farmed; that no part of it is or ever has been broken; that there is no fence upon any portion of it; that the defendant's brother did not enter it, but the defendant bought it or traded for it of one Jones; and that, for the purpose for which the plaintiff bought it, it is of no value whatever.

Ray, J.—The first paragraph of the complaint was insufficient, and the demurrer should have been sustained to it. There is no averment that the plaintiff relied upon the representations of the defendant. The want of such averment cannot be supplied by a recital of evidence which might justify a presumption that the representations were relied upon, unless such evidence be conclusive of that fact.

The judgment is reversed, with costs; and the cause remanded, with directions to sustain the demurrer to the first paragraph of the complaint.

C. E. Shipley, for appellant.

T. J. Sample, for appellee.

Ellis *v.* Wire.

Measure of Damages.—*Conversion.*—Where one forcibly took possession of certain wheat as it stood in the field, driving the owner away, and harvested and sold it;

Held, in an action for such taking and conversion, that the value of the wheat at the time of its sale, in the form in which it was sold, was the measure of damages, if the plaintiff was content therewith, though he was entitled to the highest price of the property at any time between the taking and the sale; and the defendant was not entitled to prove the value of his own labor in harvesting and threshing the crop, for the purpose of reducing the damages.

APPEAL from the Huntington Common Pleas.

Frazer, J.—This was a suit, begun before a justice of the peace, by the appellant, for the taking and conversion of wheat and straw of the appellant by the appellee.

There seems to have been no controversy in the evidence, concerning the plaintiff's title to the property. The defendant, however, forcibly took possession of it as it stood in the field, driving the plaintiff away, harvested and sold the grain for one dollar and seventy-five cents per bushel, and on the trial was permitted, over the plaintiff's objection, to prove the value of his own labor in harvesting and threshing the crop, for the purpose of reducing the damages. The question before us is as to the admissibility of this evidence. It was not admissible. The general rule in trover is, that the measure of the plaintiff's damages is the value of the property at the time of conversion, without any deduction for labor voluntarily bestowed upon it by the wrong doer. *Ewart* v. *Kerr*, 2 McMullan, 141; *Jenkins* v. *McConico*, 26 Ala. 213. The time of conversion is not, it seems, always fixed by the same circumstances. Thus, a tortious taking is sufficient proof of a conversion, but yet it appears from many of the cases that the plaintiff may elect to consider the property as still his own and treat a sale of it by the wrong doer, or a refusal to deliver on demand, as the conversion. Or it has been held, that the law will, upon the

principle of natural justice, that a wrong doer ought not to be allowed to make a profit by his own wilful tort, treat the conversion of property of fluctuating value as occurring at such time between the taking and the trial as the property bears the highest price in the market. The confusion in the cases seems in part to have arisen out of the form of the action, some courts and judges holding that by bringing trover the plaintiff precludes himself from showing that the taking was wilful, and hence that the inquiry concerning damages must in all such cases, in that form of action, be confined to the value of the property at the time of conversion, without reference to the manner of the taking. In trespass, however, no such technical reason stood in the way, and, so far as we know, there is no conflict in the cases, where that was the form of action. Some loose ideas in reference to the time of conversion have also tended to darken counsel as to the measure of damages in trover, where the general rule that the value of the property at the time of conversion has been held to be a universal rule. A wrongful taking and a demand and refusal are each held in trover to be, not a conversion, but merely sufficient evidence of it. And yet nothing can be clearer than that these things do not change the title to the property; it still remains in the plaintiff, and may, by action of replevin, be recovered in specie, so long as its identity is perceptible to the senses. It may be so recovered, though its form has been changed and its value greatly increased by the labor of the defendant, as in the case of logs converted into plank, wool into cloth, cloth into clothing, leather into boots and shoes, and the like. It may in the new form be replevied, because it is, in that form, still the property of the plaintiff, and the defendant is not entitled to compensation for the labor bestowed upon it, for that was his own folly, and, indeed, he was a wrong doer in the very act of adding such value to the property of another. The sale of the wheat was its actual conversion by the defendant, and its value at

that time, in the form in which he sold it, was the measure of damages, if the plaintiff was content therewith; though we think he was entitled to the highest price of the property at any time between the taking and the sale. So are the English cases. *Greening* v. *Wilkinson*, 1 C. & P. 625. And such seems to have been the doctrine of the common law since the Year Books. See *Brown* v. *Sax*, 7 Cow. 95; *Betts* v. *Lee*, 5 Johns. 348; *Baker* v. *Wheeler*, 8 Wend. 505; *Silsbury* v. *McCoon*, 3 N. Y. 379.

It is held otherwise in Massachusetts, but the ruling is maintained there to preserve consistency of decision, and not because it was the doctrine of the common law. We do not like the Massachusetts rule, and if the question were *res integra* we would not adopt it, for the reason that it is too tender of the interests of the wilful tort feasor.

Reversed, with costs; cause remanded for a new trial.

J. R. Slack, for appellant.

Johnson's Administrators *v.* Hedrick and Others.

Decedents' Estates.—*Administrator.*—*When Chargeable with Interest.*—An administrator delayed some ten years in settling the estate, using the money of the trust in his own private speculations, and upon a reference of his accounts to a master, it did not appear that there was any reason for any unusual delay in the settlement, and the administrator refused to account to the master for the result of said speculations. The master in making his report charged interest after the first year from the granting of administration, on balances in the hands of the administrator.

Held, that there was no error of which the administrator could avail himself, though the master should have charged *compound* interest, making annual rests in the accounts for that purpose.

APPEAL from the Warren Common Pleas.

Gregory, C. J.—The principal question involved in this case is as to interest charged to the administrators, by the

court below, on moneys in their hands during the execution of their trust.

There was a demurrer overruled to the complaint; but as no complaint was necessary, we have not examined the points made against it.

At the commencement of this proceeding, no "final settlement" of the estate had been made. A general balance had been found due from the administrators, but there had been no order of distribution, and no payment made of such balance.

In *Dufour* v. *Dufour*, 28 Ind. 421, it was held, that by the term "final settlement" as used in section 116 of the act for the settlement of decedents' estates, is not meant merely an ascertainment of the final balance of cash in the hands of an executor or administrator; it comprehends, also, a payment of that balance, so as to leave nothing to be done to complete the execution of his trust.

The accounts of the administrators were referred to a master commissioner who reported to the court the amount he found due from them. In making up this report, the master charged interest after the lapse of twelve months from the granting of letters of administration, on balances in their hands as reported by themselves to the court, at periods ranging from ten months to five years, allowing credits from the times of actual disbursements.

It is claimed that the administrators were not in default, and that they are not chargeable with interest.

Administration was granted in April, 1853, the final report was made in 1864, and no step taken to procure the final order of distribution until the commencement of this proceeding in June, 1866. There was some three thousand dollars of cash on hand at the commencement of the trust. The sale bill of personal property amounted to some twelve thousand dollars. The indebtedness of the estate was some six thousand dollars. There was no real estate reduced to assets, nor is there any reason shown by the record for any unusual delay in the settlement of the estate. There was

proof that the administrators used the moneys of the estate in their private business.

In *Dufour* v. *Dufour*, *supra*, it was ruled, that when an executor has improperly kept the legatees out of the use of their money, he is liable for interest thereon, and mere delay in settling the estate is sometimes *prima facie* evidence of his having done so.

There was not only a delay of some ten years in making settlement, but there was proof that the administrators, used the money of the trust in their own private speculations, and they refused to account to the master for the result of these speculations. *Schieffelin* v. *Stewart*, 1 Johns. Ch. 620, settles the rule as to the mode of computing interest in such cases. The master ought to have charged the administrators *compound interest*, making annual rests in the accounts for that purpose. But this is an error that did not injure the appellants, and no exceptions were taken to the master's report by the appellees.

There has been great delay in this case. It was commenced in the court below in 1866; it has been in this court some sixteen months. Great injustice has been done the appellees in withholding from them the money found due by the court below.

Under such circumstances we shall affirm the judgment, with costs, and ten per cent. damages.

B. F. Gregory, *J. Harper*, and *W. P. Rhodes*, for appellants.

J. Park and *L. T. Miller*, for appellees.

The Etchison Ditching Association *v.* Jarrell.

Draining Association—*Assessment.*—*Description of Land.*—Suit by a ditching association to enforce an assessment upon land, described in the com-

plaint as the "south half of the south-east *quarter* of section twenty-seven, in township twenty-one, north, in range six east, in the county of Madison." The assessment on which the suit was brought described the land thus: "S. ½ S. E. Sec. 27, T. 21, R. 6, E., *twenty* acres."

Held, on demurrer, that the description in the assessment was sufficient.

SAME.—*Report of Appraisers.*—The report of the appraisers set out in a complaint to enforce an assessment on land under the ditching law did not state whether the assessment made by them was of benefits or of injuries.

Held, that this omission rendered the complaint bad on demurrer.

APPEAL from the Madison Circuit Court.

RAY, J.—Suit to enforce an assessment upon land of the appellee under the ditching law. Demurrer sustained to the complaint, and judgment for appellee. It was objected that the description of the land assessed was too indefinite, being, "S ½ S. E. Sec. 27 T. 27, R. 6, E., 20 acres." The complaint describes the land as the "south half of the south-east *quarter* of section twenty-seven in township twenty-one north, in range six, east, in the county of Madison." We think the "quarter" section would be understood, and the description in the assessment returned by the appraisers sufficient. So as to the number of acres. It may be a fractional section and the number stated accurate; but if not, the particular description must control, and the number of acres must be found from this description. But another objection taken is fatal. The report of the assessors does not state whether the assessment they have made is of benefits or injuries. In the one case it comes from the owner, in the other goes to him. This is in no sense a fulfilment of the requirement of the statute. 1 G. & H. 304, sec. 12.

There was no error, therefore, in sustaining the demurrer to the complaint.

Judgment affirmed.

W. R. Pierse and *H. D. Thompson*, for appellant.

J. W. Sansberry and. *E. B. Goodykoontz*, for appellee.

The State, on the Relation of Lingenfelter, *v.* The Danville and North Salem Gravel Road Company.

Information.—*Gravel Road.—Assignment of Judgment.*—Information under section 749 of the code, against a gravel road company, for assigning a judgment rendered in its favor, there being no averment that full value was not received on such assignment.

Held, that the information would not lie.

Same.—*Failure to Collect Assessments.*—Such an information will not lie against a gravel road company for collecting only part of the amount of the assessments on particular pieces of land, there being no averment that the amount collected was less than the amount required to complete the road.

Same.—*Failure to List Lands.*—Where the assessors appointed by the county commissioners, under the act of 1867, to assess the benefits to lands lying within one mile and a half on either side of a gravel road and within a like distance from the terminus, failed to list all the lands benefited;

Held, that this was not ground for an information against the company.

APPEAL from the Hendricks Circuit Court.

This was an information under the statute, against the appellee, alleging that the appellee was a gravel road company organized in 1867, under the act authorizing the construction of plank, &c., roads, approved May 12th, 1852, and certain other acts in aid thereof; that said company having a subscription of eight hundred dollars per mile to construct its road from Danville to North Salem, and not having a sufficient amount for the construction and completion of said road between said points, the president, secretary, and directors, on the 22d of June, 1867, petitioned the board of commissioners of Hendricks county for the appointment of three disinterested freeholders of said county, to assess the amount of benefit to each tract of land within one mile and a half of said road on either side thereof, and within the like distance of the terminus thereof, and procured the appointment of three persons named as such assessors; that said appraisers assessed the benefits to a portion of the land within said limits, including a tract described, owned by the relator, the benefit to which was assessed at two hundred and fifty dollars, and certain other tracts described, belong-

ing to other persons named, at certain amounts stated; but that all the lands lying within the prescribed limits were not assessed by said appraisers; that said company has exercised powers not conferred upon it by law, in this, that on the 14th of June, 1869, said company, by its president, sold and assigned to one L. M. Campbell a certain judgment recovered by said company against one William F. Hamrick, in the Hendricks Court of Common Pleas, on the 22d of April, 1869, for two hundred and eighteen dollars, and costs, being the amount of the subscription of said Hamrick as one of the subscribers to said company, and a part of the eight hundred dollars subscribed thereto per mile; that said company has released and abated from the several assessments made on lands lying within said limits, and compromised with several owners of such lands named, and received from them less than the amounts assessed as benefits to their several tracts of land, in about the sum of four hundred dollars, and thereby the relator has been damaged fifty dollars; that said company did not assess the benefits to each tract of land lying within the prescribed limits, as required by law, to the great damage of the relator.

Prayer, that the rights and privileges of the company as a corporation be declared forfeited.

A demurrer to the information for want of sufficient facts was sustained, and the plaintiff excepted; whereupon, the plaintiff refusing to amend the complaint, judgment was rendered against the relator for costs.

RAY, J.—The allegation, that the company assigned a judgment obtained in its favor, amounts to nothing, because there is no averment that full value was not received on such assignment. Nor can the charge that the company has not collected the full amount of assessment on particular pieces of land avail, as the statute expressly limits the sum to be collected, not alone by the amount of benefit to the land, but by the amount required to complete the road. Acts 1867, p. 168, sec. 3.

The failure of the assessors to list all the land benefited is not a failure of the company, but of the appraisers, who are appointed by the county commissioners and act under oath, their duties being imposed by statute. They act under no authority derived from the company, and their omis-omission furnishes no cause of action against it. The remedy must be by proper proceeding to compel the appraisers to discharge their duty.

Judgment affirmed, with costs.

C. C. Nave, for appellant.

Frink *v.* Bellis and Another.

Parties.—*Heirs.*—*Covenant of Warranty.*—Where a covenant against incumbrances contained in a deed of conveyance of real estate is broken, and the damages for the breach accrue during the lifetime of the person holding under such covenant, his heir has no right of action on the covenant. In such case the administrator must sue.

APPEAL from the Marion Common Pleas.

Ray, J.—Joshua T. Bellis for himself and as next friend of Nannie Bellis, an infant daughter, brings this action, alleging, that the plaintiffs are the only heirs at law of Julia A. Bellis, deceased, who at her death was the wife of the one and the mother of the other. That in April, 1862, defendant Frink, for a valuable consideration, conveyed certain real estate, which is described, by general deed of warranty, to one Johnson; that when said deed was executed, there existed a mortgage lien upon the land so conveyed; that afterwards the defendant's vendee, Johnson, conveyed by warranty to one Hamlin, who, for a valuable consideration, by like deed, conveyed the property to said Julia A. Bellis; that afterwards, on, &c., "while said Julia A. Bellis was still the owner of said lots under and by virtue of said deeds," the

mortgage was foreclosed and the premises sold and said plaintiff, Joshua T. Bellis, paid the sum of seven hundred and eleven dollars, whereby the covenants of warranty were broken, and the defendant became "liable on the same to said Julia A. Bellis and her heirs."

A second paragraph avers, that to prevent a sale, the plaintiffs discharged the mortgage lien, but it does not appear that this was done after the death of Julia A. Bellis. A demurrer was filed to each paragraph of the complaint, and overruled, and error is thereon assigned.

The single question presented by the complaint is, whether the heirs may sue upon a covenant against incumbrances, broken during the life of the person under whom they claim the estate.

The appellee admits that the case of *Martin* v. *Baker*, 5 Blackf. 232, holds that the heir must sue, but insists that the law has been held otherwise, and cites us to Rawle on Covenants for Title, p. 336, 3d ed., where it is said: "But with respect to covenants, although until breach, they, equally with the warranty, passed to the heir with the land they were intended to protect, yet if a breach had occurred in the lifetime of the testator, they then became choses in action, incapable of transmission or descent, and whose right survived to the executor alone."

This we think is the law beyond reasonable question, and certainly nothing to the contrary was ruled in *Martin* v. *Baker*, *supra*, where it was said, "with respect to the second covenant set out in the declaration, viz., for quiet enjoyment against incumbrances, it may be observed that if the administrator cannot sue on the first covenant (of seisin), without avering a special damage to his intestate, it follows necessarily that, without such an averment, he cannot sue on the second." The reason given why the administrator might not sue on the covenant for seisin, without averring special damage to his intestate, is, that the heir and the administrator both cannot maintain the action. "There cannot be two recoveries against the grantor for the same

breach of covenants, and for the same damages." It of necessity follows that where the special damage is to the intestate, the administrator, and not the heir, must sue.

Here, the full damages from the breach of the warranty occurred during the life of the intestate, and the administrator could alone sue. The covenant broken and the ultimate damages occurring to and during the life of the intestate, the covenant could no longer run with the land and descend to the heir. The demurrer should have been sustained to each paragraph of the complaint.

Judgment reversed, with costs, and the cause remanded, for proceedings accordingly.

A. G. Porter, *B. Harrison*, and *W. P. Fishback*, for appellants.

J. T. Dye and *A. C. Harris*, for appellees.

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Page *v.* Thompson.

Partnership.—*Suit Between Partners.*—*Code.*—Under the code, a partner can sue his copartner, not to recover the plaintiff's share of the partnership property or assets before the partnership business has been adjusted, but to obtain an adjustment of the partnership affairs and thus recover his entire interest therein. The case made must be such as would formerly have called for the interposition of a court of equity.

Same.—Three persons were the owners of equal shares of a steamboat, which they ran on joint account as partners. Suit in the usual form as upon an assumpsit by one of them against another to recover one third of the amount which the latter owed the firm for liquors bought by him at the bar of the boat (the third partner being made a defendant to answer as to his interest). The partnership business had ceased, but there had been no settlement thereof, the firm being still indebted, and having uncollected claims due to it, and no balance having been agreed upon as due from one partner to the others or either of them, and no special promise having been made by the defendant to pay the plaintiff anything.

Held, that the suit would not lie.

APPEAL from the Jefferson Circuit Court.

FRAZER, J.—The appellant, the appellee, and another person were the owners of equal shares of the steamer "Mollie Gratz," and ran her on joint account as partners. Upon the boat they kept a bar, with liquors and cigars for sale. The appellant brought this suit against the appellee (making the other partner a defendant, to answer as to his interest), to recover one third of the amount which the appellee owed the firm for liquors, &c., purchased at the bar of the boat. The complaint was in the usual form as upon an assumpsit. The partnership business had ceased when the suit was brought, but there had been no settlement of the partnership business; the firm was still indebted and possessed uncollected claims due to it. No balance had been agreed upon as due from any partner to the others or to either of them, and no special promise had been made by the defendant to pay the plaintiff anything. The question before us is, whether under such circumstances the suit would lie.

This question must be determined as the court below determined it, in the negative. The appellant relies upon *Duck* v. *Abbott*, 24 Ind. 349; *Shalter* v. *Caldwell*, 27 Ind. 376; and *Heavilon* v. *Heavilon*, 29 Ind. 509. These cases go simply to the point that the former rule, that one partner could not sue his copartner at law, to recover his share of the partnership property or assetts, until the partnership had been adjusted, could have no application under the code; and for the plain reason that by the code we have but one form of action, which embraces all that was formerly comprehended both by actions at law and suits in equity. In equity a partner could sue his copartner and obtain an adjustment of the partnership affairs, and thus recover his whole interest therein. He can do the same thing under the code, but the action does not thereby become an action at law; nor can the suit be maintained unless the case made by the pleadings and proofs is such as would formerly have called for the interposition of a court of equity. It is, as formerly, an appeal to the power of a court of chancery,

and the case will fail if it be not such as gives a right to invoke that power. It is a misapprehension that the cases cited are to the effect that under the code a suit may be maintained which must formerly have failed both at law and in equity. We never meant to say so. This suit was to recover a debt due from one partner to the firm. It was partnership assets, and as such must be primarily applied to the payment of the partnership debts. The plaintiff had no right either at law or in equity to put any part of it in his private pocket, until the creditors of the firm were satisfied. It cannot be useful to cite authorities in support of so plain a proposition.

Affirmed, with costs.

H. W. Harrington and *C. A. Korbly*, for appellant.

C. E. Walker, for appellee.

SULLIVAN *v.* McGOWEN and Others.

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DESCENT.— *Widow.*—A., being seized in fee as tenant in common of an undivided half of certain land, died in 1856, intestate, leaving no child and no father or mother surviving him, but leaving brothers and sisters, and his wife, who afterwards married and with her husband conveyed to B. her interest in said land acquired by descent from A.

Held, in a suit against B. and the collateral heirs of A. by the grantee of the co-tenant of A., for patition, commenced in 1868, that B. was entitled to the whole of said land of which A. was seized at his death.

APPEAL from the Knox Common Pleas.

ELLIOTT, J.—This was a petition for partition filed by Francis Maier against Sullivan, the appellant, and others.

Maier claimed in the petition to be seized of an undivided half of a tract of land, therein described, and alleged that the appellant was seized of one fourth, and the collateral heirs of Neely McGowen, deceased, of the residue thereof.

The court found the facts specially and stated the conclusions of law arising thereon, which presents the questions argued here.

The facts, as they appear by the finding of the court, are, in substance, as follows: On the 11th of January, 1856, James McGowen and Neely McGowen became seized in fee, as tenants in common, by the devise of their father, of the tract of land described in the petition.

On the 10th of July, 1866, James McGowen conveyed his interest in the land to Maier.

Neely McGowen died on the 11th of July, 1856, intestate, seized of the undivided half of said land, without issue, and leaving neither father or mother surviving, but leaving his wife, Caroline, surviving as his widow, and leaving also, brothers and sisters, as stated in the petition. The interest in the land, of which said Neely McGown died seized, was, at the time of his death, of the value of nine hundred and fifty dollars, and he also left personal property of the value of five hundred and fifty dollars, of which the widow selected at the appraisement and received from the administrator, articles of the value of three hundred dollars; and the remainder of the personal property was sold by the administrator, and the proceeds applied to the payment of debts of the decedent. On the 3d day of November, 1861, said Caroline, with her second husband, Alexander McCoy, conveyed her interest in said tract of land, acquired by descent from her former husband, Neely McGowen, deceased, to the appellant, William Sullivan.

From these facts, the court, as a conclusion of law, found that the plaintiff, Maier, was the owner of one undivided half of said tract of land, and, because the personal property selected by the widow, together with the real estate of which her husband died seized, exceeded in value one thousand dollars, that therefore only one half of his estate descended to her and the remainder to his brothers and sisters; and that therefore the defendant Sullivan is the owner of only one undivided fourth of said real estate, and that

his co-defendants are the owners of one undivided fourth thereof, as set forth in the complaint.

Sullivan excepted to the conclusions of law so found by the court. Judgment was rendered in accordance with the finding. Partition was subsequently made accordingly, which the court confirmed; and Sullivan appeals.

The case was evidently decided in the court below on the third section of an act of 1853, amending the twenty-fifth section of the act regulating descents and the apportionment of estates, approved May 14th, 1852 (See Acts of 1853, pp. 55-6). And the question is discussed in this court, by the counsel on either side, upon the hypothesis that it is governed by the amendatory act of 1853. In this, counsel are mistaken. The first four sections of the act of 1853 were intended to amend sections 18, 24, 25, and 26 of the statute of descents of 1852. The sections as amended are set forth at full length, but the original sections are not set out in the amendatory act, and for that reason, were regarded as obnoxious to the twenty-first section of article four of the constitution of the State, under the decision of this court in *Langdon* v. *Applegate*, 5 Ind.. 327, at the November term, 1854. Subsequent to that decision, this and many other amendatory acts passed at the same session, which were subject to the same objection, were never acted on or enforced. In 1867, the legislature passed an act approved March 9th, 1867, which reads as follows:

"Sec. 1. *Be it enacted by the General Assembly of the State of Indiana*, That all laws heretofore passed not in conformity with the ruling of the Supreme Court of this State in the case of Langdon against Applegate and others, reported in the 5th volume of the Indiana Reports, on page 327, are hereby repealed.

"Sec. 2. All actions arising out of or for a violation of any law repealed by this act, shall be commenced within ninety days from the passage of this act, and not afterwards.

"Sec. 3. An emergency existing for the immediate tak-

ing effect of this act, the same shall be in force from and after its passage."

The case of *Langdon* v. *Applegate*, referred to in the above act, was overruled in the case of *The Greencastle Southern Turnpike Co.* v. *The State*, 28 Ind. 382; but that does not affect the question here. This suit was commenced on the 28th day of March 1868, long after any right of action under the act of 1853 was barred by the second section of the act of 1867.

The twenty-sixth section of the statute of descents (1 G. & H. 296) provides, that "if a husband or wife die, intestate, leaving no child, and no father or mother, the whole of his or her property, real and personal, shall go the survivor."

This section is still in force, and is decisive of the question involved in the case.

Neely McGowen having died intestate, leaving no child, and no father or mother, his entire interest in the land in controversy descended to his widow. *Shaw* v. *Breese*, 12 Ind. 392. And the widow having conveyed her interest to the appellant, he is entitled to have the same, that is, one half of the tract described in the complaint, set off to him, in severalty.

The judgment and all the proceedings subsequent to the finding of the facts by the court are reversed and set aside, with costs, and with directions to the court of common pleas to appoint commissioners to partition the land equally between the plaintiff below and the appellant Sullivan, and for further proceedings in accordance with this opinion.

F. W. Viehe, for appellant.

N. F. Malott and *T. R. Cobb*, for appellees.

Shaw *v.* Spencer and Another.

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Assignment of Error.—Partnership.—*Admissions.*—*Evidence.*

APPEAL from the Henry Common Pleas.

Gregory, C. J.—The appellees sued the appellant, together with James R. Shaw and Thomas A. Morris, for goods, wares, and merchandise, sold and delivered. There are two paragraphs in the complaint; the first declares against the defendants as partners; the other seeks to charge the appellant as holding himself out as a partner, and charges certain specific acts and declarations by way of estoppel *in pais*.

It is claimed by the appellant, that the court below erred in overruling a demurrer to the second paragraph of the complaint. There is no such error assigned. The second assignment is this: "The said court erred in overruling the demurrer to the second paragraph of *the answer*." We suppose this is a mistake, but it is one we cannot correct.

The next question is, did the court below err in overruling the appellant's motion for a new trial? There are several reasons urged for a new trial. It is claimed, that the court improperly excluded a part of the testimony of the appellant offered at the trial.

The plaintiffs, on the trial, relied on certain acts and declarations made by the appellant, at the time of the sale and delivery of the goods, in the store of the plaintiffs, in the city of Richmond. The appellant offered to testify, that he had other business which took him to Richmond that day. This was excluded, we think properly. It had no bearing on the question in dispute. It was wholly indifferent how the appellant happened to be at Richmond. The matters in dispute were, did he do the acts and make the declarations complained of.

It is claimed, that the declaration of James R. Shaw was improperly allowed to go the jury, tending to show that

he was a partner in the firm sued. He had filed the general denial. His admissions during the progress of the trial did not preclude the plaintiffs from making the proof. The court below properly confined the evidence to himself.

There were given in evidence, over the objection of the appellant, acts and verbal declarations done and made by the plaintiffs, at and before the sale and delivery of the goods, tending to show that they had determined not to trust James R. Shaw and Thomas A. Morris, and that the goods were sold on the credit and standing of the appellant. Under the evidence in the cause, it became material to determine to whom the credit was given. It is true that this evidence was given in chief, and not by way of rebutting the testimony offered by the defendants. But if the evidence was proper, looking to the whole record, then the appellant cannot complain.

But a majority of the court think the evidence proper in chief. Under the issues as tried, the question of estoppel was presented. To make the acts and declarations of the appellant amount to an estoppel *in pais*, they must have moved the plaintiffs to part with their goods. It then became important to know whether but for these acts and declarations the plaintiffs would have sold on credit to the other defendants. This, we think, was properly proved by the acts and declarations of the plaintiffs themselves forming a part of the transaction.

It is claimed, that the court erred in allowing evidence to go the jury contradicting the witness James R. Shaw. The witness Shaw was asked on cross examination, after he had testified in chief that the firm was composed alone of himself and Thomas A. Morris at the time of the sale, whether he did not state to a witness, naming him, at a time and place named, that Thomas A. Morris had retired from the firm (the time fixed being about a month before the purchase of the goods for which the action was brought). The witness Shaw answered in the negative. The court then allowed the witness named in the question to contradict

Shaw. It is argued that the evidence was immaterial, and the court therefor erred in allowing the contradiction. We think it was material, and therefore the contradiction properly admitted. A part of the theory of the plaintiffs' case was, that the appellant had purchased out the interest of Thomas A. Morris, and had thereby become a partner of James R. Shaw in the firm sued. At least, this evidence was a link in the chain of testimony relied on by the plaintiffs to make out their case against the appellant.

The court committed no error in overruling the motion for a new trial.

Judgment affirmed, with costs.

J. Brown, *R. L. Polk*, and *M. M. Ray*, for appellant.

J. H. Mellett and *M. E. Fortner*, for appellees.

Day *v.* Wamsley.

Pleading.—*Evidence.*—*General Denial.*—In an action to recover for goods alleged to have been sold and delivered to the defendant, he may show under an answer of general denial, that they were sold and delivered to his wife under such circumstances as not to bind him.

Principal and Agent.—*Notice to Agent.*—In a suit for goods sold and delivered, it having appeared that they were sold and delivered to the defendant's wife;

Held, that the fact that one who was a salesman of the plaintiff at the date of the sale and assisted in the sale of a part of the goods, had been told by a disinterested person in an idle conversation some months before (it not appearing that said salesman was then in the employment of the plaintiff), that the defendant and his said wife were separated at that time, could not charge the plaintiff with notice of the fact so communicated.

APPEAL from the Bartholomew Common Pleas.

Ray, J.—Complaint by appellee for goods sold and delivered to appellant. Answer in five paragraphs. First, general denial.

"*Second Paragraph.* For further answer, this defendant says that if the goods described in plaintiff's complaint were sold and delivered, they were not sold and delivered to this defendant, but to his wife, without his knowledge or consent to bind him to pay for the same; she being at that, and all times prior thereto, supplied with all necessaries suitable to the estate and condition of defendant, without said goods, and she having never bought any such goods as charged in this bill prior thereto, which ever came to the knowledge of defendant, or which were ever paid for by him.

"*Third Paragraph.* For further answer, defendant says that if any goods were purchased from plaintiff, as charged in the complaint, defendant's wife bought said goods, without his knowledge or consent, and without authority from him so to do; and when she bought them, she and defendant were living separate and apart from each other, and without fault of defendant, who had supplied her with all necessaries up to the time of said purchase, and was still ready to do so.

"*Fourth Paragraph.* For further answer, defendant says that if said goods were sold and delivered to any one, they were not sold and delivered to this defendant, but to his wife, who bought the same without his knowledge or consent, and without any authority from him so to do; that she had abandoned defendant's bed and board before that time, without cause, and was at the time of purchasing said goods, living apart from him, without cause for so doing."

To the second, third, and fourth paragraphs, demurrers were sustained. The proper method of disposition would have been to have stricken these paragraphs out on motion, as amounting simply to argumentative denials. Their effect was simply to aver that the goods were not sold to the appellant. To the fifth paragraph a reply was filed, and the cause tried; finding for the appellee. The evidence is not before us.

At the proper time, the appellant moved to suppress the sixth question and answer of Margaret Summers' deposition,

which are as follows: "Did you have any conversation with the plaintiff, or any of his clerks, relative to the separation of defendant from his wife? and if so, state when and where said conversation was held, and all that was said in said conversation."

Answer, "I had a conversation with William Atkison, I think between Christmas and New Years of 1866, at the Mooney House, in Brownstown. He asked me where I was living when at home. I told him I was living at the widow Wayman's place, at my father's. He said he was acquainted over there. I asked him who were the persons he was acquainted with, and he mentioned Mr. Parker's family, the family of the wife of the defendant. I told him that Sarah was married to Mr. Day, the defendant, though they were separated at the time. He said he supposed people would have trouble in their families sometimes, and that was about all there was of the conversation."

The deposition discloses that Atkison, at the date of the purchase of the goods by appellant's wife, was salesman in appellee's store and assisted in the sale of part of the goods for the value of which the suit was brought. The conversation spoken of by the witness occurred a few months before the date of the sale. It does not appear that Atkison was in the employ of the appellee at the date of the conversation, and therefore notice to him by such conversation would not be, according to Judge STORY's view, constructive notice to his subsequent employer. Story on Agency, § 140. There are authorities, however, which controvert this rule. Story Eq. Jurisp. § 408, note 2. But the conversation was not of such a nature as would naturally require the agent to communicate it to his principal, if he were actually in the employ of the appellee. It was the mere idle talk of parties having no interest in the subject discussed, and not likely to make any impression on the mind of the agent. The notice to the agent, to operate as constructive notice to the principal, must be such as would reasonably charge the agent, on failure to repeat, with breach

of faith and duty to his employer, and therefore the law will, under such circumstances only, presume he has communicated his knowledge to his principal. Story on Agency, § 140, and authorities cited. The rule, indeed, is, that the special circumstances of each case must control the admission or rejection of the evidence. Story Eq. Jurisp., *supra*.

The court committed no error in excluding the evidence.

Judgment affirmed, with ten per cent. damages and costs.

W. K. Marshall, *W. Herod*, and *W. W. Herod*, for appellant.

F. T. Hord, for appellee.

Dryden *v.* Knowles.

Instruction to Jury.—*Breach of Marriage Contract.*—On the trial of an action for breach of a marriage contract, where the evidence did not tend to show any fraud in the making of the contract or in its violation, the court instructed the jury as follows: "If the marriage contract and its breach by the defendant have been proved to your satisfaction in this case, and if you further believe from the evidence in the case that the element of fraud mingles in this controversy, as an ingredient in the act of the defendant, either in making the marriage contract with the plaintiff or in violating or breaking that contract, then you may award to the plaintiff, in addition to the actual loss sustained by her, such exemplary damages as shall tend to prevent a repetition of the injury, and to punish the defendant."

Held, that though the instruction stated a correct principle of law, yet, under the evidence, it was erroneous.

APPEAL from the Howard Circuit Court.

Gregory, C. J.—This was an action for the breach of a marriage contract. The appellant, the defendant below, answered by the general denial. A trial by a jury resulted in a verdict for the plaintiff, assessing the damages at three thousand dollars.

Over the objection and exception of the defendant, the

court charged the jury, that "if the marriage contract and its breach by the defendant have been proved to your satisfaction in this case, and if you further believe from the evidence in the case, that the element of fraud mingles in this controversy, as an ingredient in the act of the defendant, either in making the marriage contract with the plaintiff, or in violating or breaking that contract, then and in such case, you may award to the plaintiff, in addition to the actual loss sustained by her, such exemplary damages as shall tend to prevent a repetition of the injury, and to punish the defendant."

The giving of this instruction was one of the grounds upon which the defendant based his motion for a new trial.

In a proper case the instruction enunciates a correct principle of law; but we think that it was not applicable to the case made by the evidence, which is in the record.

The defendant resided at Kokomo, and the plaintiff at Mount Vernon. The defendant was a widower. His wife died in February, 1866. He was about forty-two years of age, and had five children, ranging from five to fourteen years of age. The plaintiff was about twenty-six years of age, and was engaged in teaching. The marriage contract was made in the fall of 1867. A correspondence by letters took place between the plaintiff and defendant, commencing early in September, and ending in January following. The 9th of January, 1868, was fixed upon as the day for the consummation of the marriage contract. The letters from the defendant to the plaintiff are of a very affectionate character up to and including the one of the 19th of December. On the 22d of December, the defendant wrote the following letter, and mailed it to the plaintiff on the 26th.

"DEAR DELIA,

"I commence this with a heavy heart and sorrowful, and when you read it you can hate me as I deserve to be. Some time before I first wrote you, I became acquainted with a lady, and paid my addresses to her. Everything went well for a time; but through the opposition of the family, a

break in our friendship occurred. I did not know at the time why this was so, and becoming indignant at the treatment I had received, determined to forever forget one who had thus treated me. In this I supposed I had succeeded, and looked upon the matter as forever settled. I then opened a correspondence with you; and when I went to Mount Vernon, I felt just as I told you. Some ten days after my return, through a friend of the lady, I learned why I had been treated in this manner, and that it was not the fault of the lady; and then, what a tumult rose in my heart! what agony when I thought of my position! I tried, day after day, hour after hour, to subdue these feelings, as I felt that my honor, my word, and all that I hold sacred were involved; and I can to-night only confess my feelings to you and say that I am ready to fulfil my promise, but must make this confession, humiliating as it is; knowing and respecting you as I do and ever must, I cannot do otherwise. This may all seem false to you, but as I expect to stand before the judgment-seat, and answer at the great day, it is the simple truth."

The defendant wrote again to the plaintiff on the 30th, expressing his regret for the state of things.

The plaintiff wrote to the defendant, insisting upon a fulfilment of the marriage contract.

For the reasons given in his letter of the 22d of December, the defendant declined to consummate the marriage. There was no conflict in the evidence as to the truth of the reasons given for a violation of the contract. The evidence did not tend to show any fraud in making the contract, and certainly none in its violation. The defendant made a frank avowal of the truth, showing that in all human probability the marriage would result in unhappiness to both parties. Indeed, it is difficult to conceive how a lady of delicacy could, under the circumstances, insist upon the marriage. The plaintiff ought to have a fair compensation for her loss by the violation of the contract; but with such a compensation she ought to be satisfied.

The instruction was calculated to mislead the jury, and the result shows that it probably did.

The court below erred in overruling the motion for a new trial.

Judgment reversed, with costs; cause remanded, with directions to grant a new trial, and for further proceedings.

D. Moss and *M. Bell*, for appellant.

N. R. Linsday, *J. A. Lewis*, and *N. P. Richmond*, for appellee.

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JOHNSON and Others *v.* COOKERLY.

CONTRACT.—*Fraud.*—*Rescission in Part.*—A. sold to B. a farm, valued in the transaction at $6,300, in part payment for which he took from B. certain western lands at $1,300, upon false and fraudulent representations of B. as to their location, character, and value per acre. Pending the transaction, B. agreed with C. to exchange said farm for another owned by C.; and, at B.'s request, A. conveyed his said farm directly to C., who continued in possession thereof. Upon discovering the fraud, A. tendered to B. a conveyance of the western lands and demanded from him $1,300.

Held, in a suit by A. demanding a rescission of the contract so far as the western lands were concerned and judgment for $1,300, that he was not entitled to such rescission.

APPEAL from the Monroe Circuit Court.

FRAZER, J.—We are asked to consider the action of the court below in overruling demurrers to the first and second paragraphs of the complaint. We decline the examination of the question concerning the first paragraph, as there was no evidence to sustain it, and no finding against the appellant upon it. The business of this court is with such matters only as may have worked prejudice to the party assigning error.

By the second paragraph it was averred, that on the 10th of April, 1866, the plaintiff, Cookerly, and the defendant

Johnson entered into a contract, whereby the plaintiff sold to Johnson a farm in Monroe county for six thousand three hundred dollars; that in part payment of said sum, the plaintiff took of Johnson three hundred and ten acres of Missouri lands at thirteen hundred dollars, upon the false and fraudulent representations of Johnson that the Missouri lands were situate in Nodaway county, within five miles of the county seat, and within fifteen miles of a railroad, well watered and timbered, of rich soil, and worth in cash five dollars per acre; that the plaintiff was ignorant concerning the Missouri lands, which Johnson knew; that, in truth, the Missouri lands were not situated where Johnson stated they were, were poor and without water or timber, and worth only two dollars per acre; that immediately upon discovering the imposition, he tendered a conveyance of these lands to Johnson and demanded the thirteen hundred dollars. It was further averred, that the appellant Ragsdale was a partner with Johnson in the transaction, and that after the contract between the plaintiff and Johnson was agreed upon, but before it was consummated, Johnson and Ragsdale agreed with one May, to exchange the Monroe county farm aforesaid for another one owned by May, and the plaintiff by their direction conveyed the farm sold by him, directly to May, who still holds possession thereof. A rescission of the contract, so far as the Missouri lands are concerned, is sought, and judgment for thirteen hundred dollars and interest thereon. The question presented is, whether, upon the facts stated, the plaintiff was entitled to such rescission.

The agreement pleaded, to sell the farm at six thousand three hundred dollars and to take the Missouri lands in payment at thirteen hundred dollars, were but parts of one entire contract. There was no sale of the farm for six thousand three hundred dollars, cash, and then an independent contract to purchase the Missouri property at thirteen hundred dollars. The thing agreed upon was, the farm for the Missouri lands and five thousand dollars in cash; and this is

not affected by the fact that the value named of the farm was six thousand three hundred dollars and of the Missouri land thirteen hundred dollars. The substance of the matter would not be changed if the farm had been stated at ten thousand dollars and the other at five thousand dollars; for in both cases it would be the same farm for the same land and five thousand dollars in cash. It matters not to practical men, negotiating for an exchange of lands, what prices may be named for the property, if the difference in values can be agreed upon. A. has no objection to take B.'s property at ten thousand dollars, if B. will take A.'s for it at the same sum, though both know well that the prices named are ten fold the fair values. In such a case, it will not do to expect a court of equity to decide that B. really contracted to buy A.'s property for ten thousand dollars and to administer relief upon that basis.

It is a general rule, that a contract will not be rescinded in part, nor when the parties cannot be placed *in statu quo*, either strictly or substantially. This is so well understood that a reference to the cases cannot be necessary. There are, however, a very few cases in the reports where this rule has been relaxed. There is none, however, that we have been able to find, in which the party seeking to rescind did not surrender every benefit which the terms of the contract or its execution had conferred upon him, and, so far as he could, had restored the other party to his original condition, except the single case of *Daniel* v. *Mitchell*, 1 Story, 172, in which, however, the court was able substantially to restore the former status.

In *Shackelford* v. *Handley's Ex'rs*, 1 A.K. Marsh. 505, it was said, that it was "without the concurrence in act or will of the injured party" that the defendant alone had produced such a change in the state of affairs that the parties could not be put in their former condition and, indeed, stress was laid upon the fact that this was done for the fraudulent purpose of inflicting still further injury upon the plaintiff.

In *Masson* v. *Bovet*, 1 Denio, 69, the very transaction ac-

complished by the defendant, which was the ground upon which the rescission was based, rendered it at once impossible ever to put the parties as they were before the transaction.

But there is an objection to rescission in part in the case before us which is insuperable. The practical effect would be to make and execute a contract never made by the parties, and which upon the facts alleged it cannot be assumed they would have made, and, indeed, which we cannot know would be a fair contract. The real value of the farm sold is not alleged; but the effect of the judgment below is that the appellants must pay six thousand three hundred dollars for it, in money. This may work injustice to them and place the plaintiffs in a better condition than if the Missouri lands had been, in quality and location, everything that was represented of them. It must appear that injustice will not be done by rescission, else the court should stay its hand, especially where there is a remedy adequate and ample for all injury done by a suit to recover damages for the fraud.

In this case, the plaintiff is in court insisting upon a part of the contract as fixing the relief to be given upon the rescission of another part—demanding the full price named in the contract, in money, without any consideration as to the real cash value of the farm which he conveyed. If the sale of the farm for six thousand three hundred dollars had been one transaction, and the taking of the Missouri land at thirteen hundred dollars had been another, then the court should let the contract fix the measure of relief upon rescission; for then the sums named would have been fixed by the parties as actual values agreed upon, and not arbitrary estimates of no real importance in the opinion of either.

Rinker v. *Sharp*, 5 Blackf. 185, was very much like the case before us in an important particular. Lands were exchanged, estimated at eight hundred dollars and eighteen hundred dollars respectively, the difference, one thousand dollars, being paid in money. There were false representa-

tions concerning the eight hundred-dollar tract, and the suit was to recover the eight hundred dollars upon a rescission. DEWEY, J., said, "we are not acquainted with any principle of law which authorizes one of the parties to a contract to insist upon the benefit of that part of it which pleases him, and to rescind another portion which he considers disadvantageous." So here, the plaintiff is not willing to give up so much of the contract as names values. It is not out of his power to surrender that much, at least, and to offer to take a fair price, or such sum in addition to the five thousand dollars cash received as would make a reasonable and just price for his farm. He claims thus a benefit from the very contract a part of which he seeks to rescind. We think that no case can be found in the books which will sustain him in this. *Gatling* v. *Newell*, 9 Ind. 572, is certainly against him.

There was, in our opinion, no case for rescission in the paragraph, or the special findings of the court (which were substantially the facts alleged in this paragraph), or in the evidence.

Reversed, with costs, and directions to sustain the demurrer and proceed according to this opinion.

W. R. Harrison, *W. S. Shirley*, *G. A. Buskirk*, and *J. S. S. Hunter*, for appellants.

S. H. Buskirk, *J. Hughes*, and *J. H. Harvey*, for appellee.

PORTER *v.* DEARINGER.

CONTRACT.—*Novation.*—In consideration of the oral agreement of A. to convey certain real estate to B., the latter executed his note to C. for a certain sum due from A. to C., who received said note in full satisfaction of his claim on A., who afterwards refused to convey to B. said real estate, with-

out which B. was insolvent at the time of the transaction and so continued to be.

Held, that A. was released from his obligation to C.

APPEAL from the Howard Circuit Court.

GREGORY, C. J.—A demurrer was overruled to the fourth paragraph of the complaint; and this is the first error complained of.

The paragraph shows, substantially, that the defendant was indebted to the plaintiff, in the sum of three hundred dollars, for a balance due on the exchange of property; that, in consideration of the oral agreement of the defendant that he would convey certain real estate to one Holtzman, the latter assumed to pay the debt to the plaintiff, and executed his note therefor, which the plaintiff received in full satisfaction; that the defendant refused to make the conveyance to Holtzman, thereby rendering the note void; that Holtzman was insolvent, without the lot, at the time of the transaction, and so continued to be up to the time of suit brought.

As between the plaintiff and Holtzman the consideration of the note was the release of the defendant by the plaintiff. The failure of the defendant to convey the real estate to Holtzman was no defense to the note payable to the plaintiff. *Henry* v. *Ritenour*, 31 Ind. 136.

There is nothing averred in the paragraph to take the case out of the general rule. The court below erred in overruling the demurrer.

The evidence fails to make a case against the appellant.

The court erred in overruling the motion for a new trial.

Judgment reversed, with costs; cause remanded, with direction to sustain the demurrer to the fourth paragraph of the complaint, and to grant a new trial, and for further proceedings.

J. W. Robinson, *H. A. Brouse*, and *M. Bell*, for appellant.

N. R. Linsday and *N. P. Richmond*, for appellee.

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THE CITY OF INDIANAPOLIS *v.* PATTERSON and Another.

MANDATE.—*City.—Street Improvement.*—Where, the common council of a city incorporated under the general law of 1867 having approved an estimate of work done under a contract for grading a street of said city, duly made by the city engineer, according to the contract, and having ordered the payment thereof to the contractor by the adjacent property holders on said street, and some of said owners having refused to pay, the council afterwards rescinded its order approving said estimate and adopted and approved another estimate for a less amount than was due under the contract;

Held, that if the power of the council over the estimate was exhausted when it had first approved it and directed its payment, and said rescission was therefore void, the only relief the contractor could obtain by mandate would be to compel the council to issue a precept on said first estimate; and the complaint for a mandate must allege that an affidavit had been filed as required by section 71 of said act of 1867.

Held, also, that if the council had power to so revise its action, a mandate would not lie to direct what the decision of the question involved should be.

APPEAL from the Marion Common Pleas.

FRAZER, J.—This was a proceeding for a mandate. The complaint alleged, that the plaintiffs were contractors for grading a certain street in Indianapolis, and that they had performed the work; that an estimate thereof, according to the contract, had been duly made by the city engineer, which was reported to the city council and by that body approved and directed to be paid to the plaintiffs by the adjacent property holders upon the street; that some of such owners refused to pay; that subsequently the council rescinded its order approving this estimate and adopted and approved another estimate for a less sum than was due according to contract, and upon special request refuse to issue a precept upon the first estimate, and refuse to restore the same. It is prayed that they be compelled to restore the first estimate, &c.

If it be a sound proposition, that the power of the council over the estimate was exhausted when it had first approved it and directed its payment, then its subsequent action in rescinding that approval was void and of no effect

whatever in law, being an act which the council had no jurisdiction to perform. This is the ground maintained in argument by the appellees, and to two members of the court, as at present advised, it seems to be correct. But in that view, the approval of the first estimate still stands, and the only relief which the plaintiffs can obtain by mandate is to compel the council to issue a precept upon that estimate. Such precept, however, cannot issue until the affidavit required by statute shall have been filed. Acts 1867, p. 67, sec. 71. The complaint however does not allege that such affidavit has been filed, and, consequently, it makes no case for a mandate.

On the other hand, if the council had authority to revise its action, after having once acted, and again to exercise the judgment and discretion involved in a reconsideration of the correctness of the estimate, it is not competent for the courts to control its action and determine how the question involved shall be decided, and to require it to be determined in a particular way. In that view, a mandate may compel action, but it cannot compel the council to follow the opinion of the court as to what the action or decision shall be, where the exercise of judgment is involved; and hence, upon the latter view of the law, the complaint would be clearly bad.

Disposing of the case in this manner upon the complaint, it becomes unnecessary to examine a number of other questions which have been agitated by the argument.

Reversed, with costs, and directions to set aside all proceedings subsequent to the appearance of the defendant, and to permit the plaintiffs to amend the complaint.

B. K. Elliott and *C. L. Holstein*, for appellant.

H. C. Newcomb, *J. L. Mitchell*, and *W. A. Ketcham* for appellees.

SMITH *v.* THE STATE.

CRIMINAL LAW.—*Indictment.*—*False Pretense.*—Indictment for obtaining under false pretenses "twenty-five dollars in money of the personal goods and chattles of," &c.

Held, on motion to quash, that the property was not described with sufficient particularity.

SAME.—*Evidence.*—An indictment for obtaining money under a false pretense set out, as the pretense, a bank check without date; and it was averred that a more particular description of the check could not be given, because it had been torn and partially destroyed by the defendant. On the trial, a check dated "Ja. 16, 1869," was read in evidence, over the defendant's objection.

Held, that the admission of this evidence was error.

APPEAL from the Marion Criminal Circuit Court.

RAY, J.—Indictment for obtaining under false pretenses, "twenty-five dollars in money of the personal goods and chattels of," &c. Motion to quash overruled. This is assigned for error.

In *The People* v. *Conger*, 1 Wheeler Crim. Cas. 448, it is held, that the property obtained under a false pretense must be described with as much accuracy and particularity as goods stolen must be in an indictment for larceny. *Markle* v. *The State*, 3 Ind. 535; 3 Chit. Crim. Law, 999. In the case of *The State* v. *Stintson*, 4 Zab. 1, the charge that the defendant converted to his own use ten thousand dollars of money and nineteen thousand dollars of bank bills was held insufficient, and that there should be some description, either of the number or denomination of the coins and of the notes, and also an averment of the value of the notes. And this ruling was upon the ground that the term "dollar" is both the name of a coin and an expression of value, and hence the charge of embezzling a certain number of dollars is uncertain and vicious. Still more force is given to this objection, when it is remembered that we now have both coin and paper represented by the word dollar. Under the allegation in this indictment, it does not

appear whether the appellant was charged with obtaining by false pretenses twenty-five coin dollars or twenty-five legal tender bills of the denomination of one dollar each, or yet coin or bills of various denominations amounting in value to a total of twenty-five dollars. Such uncertainty cannot be permitted in criminal pleading. *Rex* v. *Fry*, Russ. & Ryan, 481; Whar. Crim. Law, § 363. The motion to quash should have been sustained.

The indictment set out a copy of a bank check, without date, which it was alleged had been used as the pretense for obtaining the loan of money from the prosecuting witness; and it was averred, that a more particular description of the check could not be given, because the same had been torn and partially destroyed by the defendant. On the trial, a check was offered in evidence, dated "Ja. 16, 1869," and, over the objection of defendant, the check was read in evidence.

This we think was error. There was a clear variance between the allegation and the proof offered to sustain it.

Judgment reversed, and cause remanded, with direction to sustain the motion to quash.

Order remanding appellant.

O. F. Baker and *W. W. Leathers*, for appellant.

D. E. Williamson, Attorney General, for the State.

Swindler and Others *v.* The Monrovia and Belleville Gravel Road Company and Others.

County Commissioners.—*Appeal.*—*Gravel Road.*—Any person interested might appeal from the decision of a board of county commissioners appointing assessors under the act of March 11th, 1867, to assess benefits expected to result to lands from the construction of a gravel road. But there could be no party to the proceeding before said board but the gravel road company; and before an appeal can be taken from the decision of such board

by a person not a party, he must file his affidavit of interest in the office of the county auditor, as provided by section 31, 1 G. & H. 253.

APPEAL from the Hendricks Circuit Court.

The Monrovia and Belleville Gravel Road Company filed a petition before the board of commissioners of Hendricks county, under the act of March 11th, 1867 (Acts 1867, p. 167), for the appointment of three disinterested freeholders of the county, to assess the amount of benefits that would result from the construction of the road of said company to the lands within one mile and a half on either side of said road and within the like distance of the north end thereof (the south end being in Morgan county). The appellants presented a remonstrance to the board, against the appointment of said assessors, setting forth a number of reasons why they should not be appointed. On motion of said company, the remonstrance was rejected, on the ground that the filing thereof was not authorized by law. The board then heard proof, and found in favor of the petition, and appointed said assessors. The appellants filed an appeal bond, which was approved by the auditor, who made a transcript of the papers, which was filed in the circuit court as an appeal. The circuit court, on motion of said company, dismissed the appeal, and judgment was rendered against the appellants for costs.

FRAZER, J.—We think that any one interested may appeal from the decision of the board of commissioners appointing persons, under the act of March 11th, 1867, to assess benefits to land, expected to result from the construction of a gravel road. The case of *Jones* v. *Theiss*, 30 Ind. 311, seems to us to cover the question, and the principle declared in *Hanna* v. *Commissioners*, &c., 29 Ind. 170, is applicable; and, it may be added, it is of the highest importance to the rights of those interested and very essential to the protection of their interests, that an appeal should in such cases be allowed.

But the gravel road company is the only party to the proceedings before the commissioners. The law gives no right of remonstrance there, and hence there can be no adverse party in that tribunal. It follows that there must be an affidavit of interest in the matter on the part of the appellant filed with the auditor before such appeal can be taken. 1 G. & H. 253, sec. 31. As that was not done in this case, the court below was correct in dismissing the appeal. *Jones* v. *Thciss, supra.*

Affirmed, with costs.

C. C. Nave, for appellants.

L. M. Campbell, for appellees.

Ferguson *v.* Stafford and Others.

Evidence.—*Opinion of Witness.*—Where the value of property, real or personal, comes in question, a witness who has a personal knowledge of the property and who possesses the necessary information to enable him to form a proper estimate of its value, will be permitted to give his opinion in reference to such value.

Same.—*Waste.*—On the trial of an action for waste against one holding under a will till the youngest of the plaintiffs should come of age, a witness having testified that he knew the premises, a farm, its improvements and condition, when the defendant took possession, and also its condition at the commencement of the suit, and having described its condition at each of these periods;

Held, that there was no error in permitting said witness, over the defendant's objection, to give his opinion as to the value of the farm at the time the action was commenced, and also what it would then have been worth if kept in ordinarily good repair and cultivated in a husbandlike manner, or in permitting him to give his opinion as to the cost, in detail, of putting the farm in good condition and repair.

APPEAL from the Owen Circuit Court.

Elliott, J.—This was a suit for waste, brought by Oliver Stafford, Phœbe Ann Stratton and her husband John Stratton, and Scott Stafford, by Emanuel W. Stafford, his guardi-

an, against Fanny Ferguson and John W. Ferguson, her husband, said Oliver, Phœbe Ann, and Scott, being children of Grant Stafford, deceased, and said Fanny (now the wife of John W. Ferguson) being his widow. The suit was commenced in Morgan county, and a trial of it there resulted in a verdict in favor of the defendant John W. Ferguson, and in favor of the plaintiffs against said Fanny, but a new trial was granted to her, after which the case was taken, on change of venue, to Owen county. The record shows that in 1852, Grant Stafford died testate, seized in fee of a valuable farm in Morgan county, which by his last will he devised to said Fanny, then his wife, until his youngest child should arrive at the age of twenty-one years, and then to his three youngest children, the appellees in this suit, charged however, with the comfortable support of said Fanny during her natural life. And it is alleged, that at the death of the testator, the farm was well improved and in a high state of cultivation; that there was then situate on the farm a brick and frame residence, in good repair and condition, a large frame barn, large cribs, stables and other out houses, all in good condition; that the farm was well and securely fenced into convenient fields, and had on it an orchard of choice apple and small fruit trees; that said Fanny, prior to her marriage with said Ferguson, and since then with him, had been in possession of said farm continually after the death of the testator, and had caused, suffered and permitted the houses and barns to decay and become worthless, by neglect and refusal to repair them, destroyed the orchard and garden, suffered the fences to decay and become destroyed, and so abused and improvidently managed the cultivation of the lands as to render them poor and unproductive, and wholly refuses to apply any portion of the profits derived therefrom to the necessary repairs of the farm; that the farm, in soil, orchard, houses, barns, stables, fences, pastures, and meadows, has become wasted, and suffered irreparable damage; that said Fanny wholly refuses to repair; and that Scott Stafford, the young-

est of the testator's children, was only seventeen years of age.

Prayer for injunction restraining further waste, and for the appointment of a receiver and the application of the rents and profits, during the remainder of said Fanny's term, to the repairs of the farm, and for general relief. There was an answer in two paragraphs, one of which was a direct, and the other an argumentative denial of the allegations of the complaint.

The cause was tried by a jury, who found for the plaintiffs, and assessed their damages at fifteen hundred dollars.

Motion a new trial overruled, and judgment on the verdict.

The questions urged by counsel as grounds of reversal arise on the refusal of the court to grant a new trial, because of alleged errors in the admission of certain evidence over the appellant's objections.

James M. Stafford, having testified that he had an intimate knowledge of the farm, its improvements and condition, when it came into the possession of the appellant, and also with its condition at the commencement of the suit, and that when the appellant took possession, the fences, gates, buildings, orchard, and garden, were all in good repair, and the lands in a superior state of cultivation, then described its condition at the commencement of the suit, and stated that when the appellant took possession there were ten good gates on the farm, which are all gone; that eight hundred and ninety-five rods of fencing were gone, requiring to replace them seventeen thousand eight hundred and eighty rails. He then, over the appellant's objection, stated that ten years ago, when the rails were removed, rails were worth two dollars and fifty cents per hundred; that rails there were now worth five dollars per hundred; that if the gates had been kept in reasonable repair, they would be worth from three to five dollars each. This and several other witnesses, who knew the condition of the farm at the testator's death, and also at the commencement

of the suit, were permitted to give their opinions as to its value at the last named period, in the condition it was then in, and also what it would then have been worth if the buildings, orchards, fences, and grounds, had been kept in ordinary good repair and cultivated in a husbandlike manner. The objection urged to the evidence is, that it consisted of the speculative opinions of the witnesses, and, in effect, estimated the damages, and thereby usurped the province of the jury; that the witnesses should have been confined to a statement of the facts, leaving the jury to draw their own conclusions in estimating the damages.

The general rule certainly is, that witnesses are only permitted to state the facts within their own personal knowledge, but not their opinions, conclusions, or deductions. These can only be made by the tribunal whose duty it is to decide upon questions of fact. But there are exceptions to this rule; one of which is, that when the value of property, real or personal, comes in question, witnesses having a personal knowledge of the property, and who posses the necessary knowledge and information to enable them to form a proper estimate of its value, are permitted to give their opinions in reference to it. *Evansville, &c., R. R. Co.* v. *Fitzpatrick*, 10 Ind. 120; *The Jeffersonville R. R. Co.* v. *Lanham*, 27 Ind. 171; *Van Deusen* v. *Young*, 29 N. Y. 9; *Mayor* v. *Pentz*, 24 Wend. 667; *Joy* v. *Hopkins*, 5 Denio, 84; Sedgw. Dam. 592, 2 ed. In *Clark* v. *Baird*, 9 N. Y. 183, after a careful examination of the question, it was held, that the opinion of witnesses acquainted with real estate, the value of which is in dispute, are competent upon the question of such value. In many cases the admission of such evidence would seem to be a necessity, indeed, is the best evidence of which the question is susceptible, and constitutes the only reasonable means of arriving at a proper conclusion. Thus, in a suit for the conversion of personal property having no fixed or definite market value, how can the value be ascertained except by the opinions of witnesses acquainted with the property and knowing its quality and condition? Suppose

the property, the value of which is in question, to be a horse, a description of his age, size, color, form, and gait, would give but a very indefinite idea of his value. The description would be equally applicable to a multitude of horses differing greatly in value; but the opinion of witnesses who know him and have a personal knowledge of all his qualities, would give a much more reliable idea of his value.

Here the value of the farm, as an inheritance, in its dilapidated condition, and what its value would have been had it been kept in a proper state of repair and cultivation, were proper matters for the consideration of the jury in estimating the damages. These facts could be best ascertained by the opinions of those who, from a personal knowledge of the farm, its quality and condition, were qualified to judge of them. The admission of such evidence is sustained by the case of *Clark* v. *Baird, supra.*

Greer, a witness, testified, that "the orchard was damaged one hundred dollars; vineyard, two hundred dollars; houses, four hundred dollars; stock stable, two hundred and fifty dollars; barn, forty dollars; missing fences worth three hundred and fifty dollars; to repair fencing now standing, two hundred dollars, plank fence around the yard and gates sixty dollars, large gates thirty dollars, pastures three hundred dollars, bayou one hundred and fifty dollars; timber cut down and not used worth fifty dollars, shrubbery thirty dollars." This evidence was excepted to.

It will be observed that the witness, in refering to the orchard, vineyard, houses, stock stable, and barn, spoke of them as being *damaged* in the several sums named. This, under the general rule, that witnesses are not permitted to state their opinions as to the amount of damages, would, if unexplained, be error; but the witness, after stating that he had known the farm well since 1841 and had an intimate knowledge of its condition from the time the appellant came into its possession, and after having given a full statement in detail of its condition when it came into the appellant's possession, and also at the time of the trial, said that

he "had made an estimate of the cost of putting the farm in a good condition of repair," which he then proceeded to given in detail, and in doing so used the word "damaged" in reference to some of the items. It is apparent from the whole of his evidence that he was speaking of the estimated cost in making the repairs referred to, and, we think, could not have been otherwise understood by the jury. Thus understood, the evidence was proper, notwithstanding the use of an unhappy or improper term to express the idea intended and really conveyed.

The record shows that the court very fully instructed the jury that the appellees could only recover for the permanent injury to the reversion, caused by the voluntary or permissive waste of the appellant. The evidence not only sustains the verdict, but would have justified the finding of a much larger amount in damages; and we find nothing in the record to justify a reversal.

Judgment affirmed, with costs.

S. H. Buskirk, *C. F. McNutt*, *W. A. Montgomery*, and *G. W. Grubbs*, for appellant.

S. Claypool, *W. R. Harrison*, and *W. S. Shirley*, for appellees.

Rose *v.* The State.

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Criminal Law.—*Information.*—*Rescue of Prisoner.*—*Assault and Battery.*—Under an information for forcibly freeing a person from legal arrest, an assault and battery being sufficiently charged against the defendant also, as the means by which the rescue was accomplished, the defendant may be convicted of the assault and battery and acquitted of the rescue.

APPEAL from the Owen Common Pleas.

Ray, J.—This was a prosecution against the appellant for rescuing a prisoner from the custody of the sheriff of Owen county.

The information charges, that on the 22d day October, 1868, one Samuel McBride filed an affidavit, charging James Rose and Dennis Rose with an assault and battery on the person of said affiant; that an information was filed and a writ issued thereon, directed to the sheriff of said county, to be by him executed; that on the same day, said sheriff, Isaac S. Lucas, did arrest said James Rose on said writ. The information then charges, that while said James Rose was in the lawful custody of said sheriff, John J. Rose, well knowing the said James Rose to be lawfully under arrest, "did then and there in and upon the said Isaac S. Lucas make an assault, and him, the said Isaac S. Lucas, did then and there unlawfully, touch, strike, beat, and wound, and then and there and thereby, well knowing the said James Rose to be legally under arrest and in the custody of," &c., "unlawfully and forcibly free said James Rose from said legal custody and arrest," &c.

Defendant moved to quash the information and affidavit; the motion was overruled, and the defendant excepted.

Trial by jury, and verdict as follows: "We the jury find the defendant not guilty of rescuing a prisoner from the custody of an officer, as charged in the information; and we find him guilty of an assault and battery, and assess his fine at two hundred dollars.

Defendant moved in arrest of judgment and for the discharge of the defendant, for the reasons, "first, that the verdict is void; second, that the verdict acquits the defendant of the only criminal charge in the information; third, that no assault and battery is charged in the information."

The motion was overruled, and the defendant excepted.

There were instructions given to the jury to which exception is taken in this court; but no motion for a new trial was made, and no question was therefore reserved, except on the motions to quash and in arrest. No argument is presented on the motion to quash.

Our statute provides, that upon an indictment for an offense consisting of different degrees, the jury may acquit

of the degree charged and convict of an inferior degree. It then declares, that "in all other cases, the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment." 2 G. & H. 405, secs. 72, 73. It is attempted to sustain the overruling of the motion in arrest under the section of the statute cited. But an assault and battery is not necessarily included in the rescue of a prisoner. The conviction, however, was right at common law. The assault and battery was properly charged. *Corneille* v. *The State*, 16 Ind. 232. Both offenses were misdemeanors, and "wherever crimes are of equal grade, there can be no technical merger." *The People* v. *Mather*, 4 Wend. 229. In *The People* v. *Carmichael*, 5 Mich. 10, it was held, that the intent to commit or the commission of an injury, as a means to the accomplishment of another ultimate and unlawful object, is not, by the existence of such ultimate design, taken out of the operation of the statute.

The motion in arrest was properly overruled.

Judgment affirmed, with costs.

A. T. Rose, for appellant.

D. E. Williamson, Attorney General, for the State.

Kirkpatrick *v.* Snyder and Others.

Contract.—*Failure to Receive Goods Contracted for.—Notice.*—A. contracted with B. to deliver to the latter a certain number of hoop-poles, at a stipulated price, at a certain railroad station, by the last of November, B. to advance money to A. from time to time, to enable him to buy the poles, and B. to pay for the poles on final delivery. A portion of the poles were delivered on the contract, and B. advanced to A. money on the contract, more than sufficient to pay for the poles delivered. The remainder of the poles were placed by A. at said station, at a place pointed out by B., with those already delivered, and in the latter part of November A. notified B. that the poles

were ready for delivery, and requested him to receive and pay for them, which B. declined to do, saying he was not ready to ship them. Late in December, A. told B. that if the latter did not come and receive and pay for the poles, the former would not keep them longer, and B. promised to receive them in ten days. In the latter part of the following January, A. gave B. written notice to receive and pay for the poles within eight days, or he would sell them to get the money due him on the contract. In the following March, A. sold, for their full value, to C., said remainder of the poles, not counted to B. as required by the contract, B. not having offered at any time until after said sale to receive and pay for them.

Held, that an action of replevin by B. against C., for the poles so purchased by the latter, would not lie.

EVIDENCE.—*Opinion of Witness.—Replevin.*—On the trial of an action of replevin, a witness was permitted, over the defendant's objection, to give his opinion as to the amount of damages suffered by the plaintiff by reason of the detention of the property by the defendant, without stating any facts upon which he based such opinion.

Held, that this was error.

APPEAL from the Blackford Circuit Court.

GREGORY, C. J.—This is an action of replevin by the appellees against the appellant for "ten thousand double tight hickory hoop-poles." The defendant filed the general denial. Trial by a jury; verdict for the plaintiffs; motion for a new trial overruled.

One Miller made a contract with the plaintiffs to deliver them five thousand hoop-poles, at thirty-five dollars per thousand, and fifteen thousand at forty dollars per thousand. According to the testimony of one of the appellees, Snyder, the poles were to be delivered after seeding time (1867), at the railroad station at Hartford City. According to the testimony of Miller, they were to be delivered at the railroad station at Hartford City, by the last of November, 1867. The plaintiffs were to advance money to Miller from time to time, to enable him to buy the poles, and were to pay therefor on final delivery. About ten thousand of the poles were delivered on the contract. The plaintiffs advanced some six or seven hundred dollars to Miller on the contract. By the 25th of October, 1867, Miller placed at a point near the railroad station, pointed out by the plaintiffs, about twenty thousand five hundred and two poles,

including those counted and delivered to the plaintiffs. About the 20th of November, Miller notified the plaintiffs that the poles were ready for delivery, and the former requested the latter to receive and pay therefor. The plaintiffs declined to do so, saying that they were not ready to ship them. On the 24th of December, Miller told the plaintiffs that if they did not come and receive and pay for the poles, he would not keep them any longer. The appellees promised to receive them in ten days. On the 20th of January, 1868, Miller gave the plaintiffs written notice to come and receive the poles and pay therefor by the 28th of that month, or he would sell them to get the money due him on the contract. On the 10th of March, 1868, Miller sold the residue of the poles, about ten thousand, to the appellant, for their full value. The plaintiffs demanded the poles of the appellant, who refused to deliver them up. This suit was commenced on the 30th of March, 1868, in a day or two after the demand. The plaintiffs resided at Winchester, and at no time until after the sale to the appellant did they offer to receive and pay for the poles; and, indeed, they were never counted by Miller to the plaintiffs, as by the contract they were to be.

One of the appellees, Snyder, over the objection of the appellant, was permitted to testify that the damages to the plaintiffs by the detention of the poles by the defendant was fifty dollars. No facts were stated by the witness or others from which such a conclusion could be drawn; but it was given to the jury as a naked estimate in the opinion of the witness of the amount of the damages. The jury assessed the damages at seventy dollars and ninety-eight cents.

Excessive damages is one of the grounds stated for a new trial in the written motion therefor.

We think the evidence does not sustain the finding. Under the contract, as given by either Snyder or Miller, it was the duty of the plaintiffs within a reasonable time, on demand, to receive and pay for the poles. This they refused

to do. The property in them did not pass to the appellees by their delivery at the place pointed out, until they were counted and paid for. The refusal of the plaintiffs to receive and pay for the poles from the 20th of November until after their sale in March was an unreasonable delay and justified Miller in making the sale to the appellant.

The court erred in allowing Snyder to give his opinion as to the amount of the damages without stating any fact upon which he based that opinion.

The damages were excessive, even if the plaintiffs had been entitled to recover.

The court erred in overruling the motion for a new trial.

Judgment reversed, with costs; cause remanded, with directions to grant a new trial, and for further proceedings.

A. B. Jetmore and *J. Brownlee*, for appellant.

HOFFA *v.* HOFFMAN.

PLEADING.—*Answer.*—Suit on a note and mortgage executed by the defendant to the plaintiff. Answer, pleaded in bar, that a third person named was the owner of a certain portion of the land described in the mortgage.

Held, that, as a plea in bar, the answer was bad.

SAME.—*Counter Claim.*—*Warranty.*—Answer, also, by way of counter claim, that the note and mortgage sued on were given in consideration of the machinery of a carding machine and woollen factory, and for no other consideration; that the plaintiff warranted the machinery to be sound, in good running condition, and free from rust; whereas it was not in good running condition and free from rust, but out of gear, many of the cogs being broken, and many of the rollers being so badly eaten with rust that they were worthless; whereby the defendant was damaged, &c.

Held, that this was a good counter claim.

SAME.—*Fraud.*—When the buyer of an article seeks to recover damages of the seller for false and fraudulent representations made by the latter to the former concerning the article, he must allege that he relied on such representations in making the purchase.

SALE.—*False Representations.*—In the sale of a woollen factory, its manufac-

turing capacity and the amount of custom which it has had in the past are matters which the seller is bound, in good faith, not to knowingly misrepresent to the buyer, ignorant of the facts and relying on the representations of the seller.

NOVATION.—A. sold to B. a certain woollen factory, for which the latter executed to the former a note and a mortgage on real estate to secure the same. Soon afterwards, B. sold a part of the factory to C., who thereby became indebted to B. in the amount of said note and mortgage. Subsequently, A. B. and C. mutually agreed that A. should take C. for said debt and release B., who, in consideration thereof, should release C., which he then did.

Held, in a suit afterwards brought by A. against B. on said note and mortgage, that this was a valid novation.

APPEAL frrom the Clay Common Pleas.

GREGORY, C. J.—Suit by Hoffman against Isaac Hoffa on a note and mortgage.

The defendant answered, first, "that one Aaron Hoffa is the owner of one-tenth of the land described in the mortgage." Second, that the note and mortgage were given in consideration of the machinery of a carding machine and woollen factory, and for no other consideration whatever; that the plaintiff warranted the machinery to be sound, in good running condition, and free from rust; whereas, the same was not in good running condition and free from rust, but out of gear, many of the cogs broken, and many of the rollers so badly eaten with rust as to be worthless; whereby the defendant was damaged two hundred dollars, which he pleads as a counter claim to so much of the plaintiff's cause of action. Third, that the note and mortgage were given in consideration of the machinery of a woolen factory, in Bowling Green, and for no other consideration whatever; that the plaintiff, well knowing the premises, falsely and fraudulently represented said woollen factory to be in good running order and the machinery thereof sound and free from rust; whereas said factory was not in good running order and the machinery thereof sound and free from rust, but that the said factory was out of running order, many of the cogs in said machinery broken, and the cogs and rollers so badly eaten with rust as to be wholly worthless; whereby the defendant was damaged one thous-

and dollars. Fourth, that the note and mortgage were given for a woollen factory in Bowling Green, and for no other consideration; that said factory had long been established at said town, under the control of the plaintiff; and that he, well knowing the premises, falsely and fraudulently represented to the defendant that said factory was capable of manufacturing wool enough in one season to make the owner thereof ten thousand dollars in clear money; that it so performed for the plaintiff in the season of 1867; that there was custom enough to said factory for the year 1867 to make that amount to the owners thereof, and would be that amount for 1868; whereas said factory was not capable of manufacturing wool enough to earn more than five thousand dollars in one season, and did not earn for the owners thereof more than that sum for the year 1867, and there was not more than five thousand dollars custom furnished said factory for 1867, nor more than that for 1868; that the defendant was ignorant of said fact and relied wholly on the statement of the plaintiff; wherefore the defendant has been damaged ten thousand dollars, for which he demands judgment. Fifth, that soon after the note and mortgage were executed, he sold a part of the woollen factory in Bowling Green to one Jason W. Brown, whereby said Brown became indebted to the defendant in the amount of the note and mortgage in suit; that afterwards, the plaintiff, the defendant, and said Brown were together, when it was mutually agreed between them that the plaintiff should take said Brown for said debt and release the defendant, and in consideration thereof, the defendant was to release said Brown, which he then and there did; all of which contract was fully consummated and executed before the commencement of this suit.

A several demurrer was filed to each paragraph of the answer and sustained. This action of the court below presents the questions involved in this case.

The first paragraph is clearly bad; it is no defense to the

action. It was pleaded in bar, and not for the purpose of bringing new parties before the court.

The second paragraph was a good counter claim for two hundred dollars, and being so pleaded, the court erred in sustaining the demurrer thereto.

The third paragraph is bad, for not averring that the defendant relied on the false and fraudulent representations made by the plaintiff, and the court therefore committed no error in sustaining the demurrer to it.

The fourth paragraph is good. The false and fraudulent representations as to the capacity of the woollen factory, as to what it had done, and the amount of custom thereto in the past, were matters about which the plaintiff was held in good faith not to misrepresent; and if he did so misrepresent as alleged, and the defendant relied thereon, then it is a good defense to the amount of the damage the defendant sustained thereby.

The fifth paragraph shows a valid novation. *Heaton* v. *Angier*, 7 N. H. 397, is in point. In that case, the defendant having bought the wagon (the price of which was the subject of the action) of the plaintiff at auction, sold it immediately afterwards, on the same day, to one John Chase. Chase and the defendant then went to the plaintiff, and Chase agreed to pay the price of the wagon to the plaintiff for the defendant, and the plaintiff agreed to take Chase as paymaster. And it was held, that the debt due from the defendant to the plaintiff was extinguished. GREEN, J., having cited the case put by BULLER, J., in *Tatlock* v. *Harris*, 3 T. R. 174, said: "The case thus put by BULLER is the very case now before us. Heaton, Angier, and Chase being together, it was agreed between them that the plaintiff should take Chase as his debtor for the sum due from the defendant. The debt due to the plaintiff from the defendant was thus extinguished. It was an accord executed. And Chase, by assuming the debt due to the plaintiff, must be considered as having paid that amount to the defendant, as part of the price he was to pay the defendant for the wagon."

Cases like this stand upon a different ground from those in which the defendant undertakes to pay the debt of a third person.

The court below therefore also erred in sustaining the demurrer to the fifth paragraph of the answer.

For these several errors the judgment is reversed, with costs, and the cause remanded, with directions to overrule the demurrer to the second, fourth, and fifth paragraphs of the answer, and for further proceedings.

A. T. Rose and *S. D. Coffey*, for appellant.

W. W. Carter, for appellee.

MOUSLER and Wife *v.* HARDING.

SLANDER.—*Malice.*—*Defense.*—To render slanderous words actionable, malice is essential; but where words actionable in themselves are spoken in a criminal sense and are false, malice is implied. The fact that they are spoken in the heat of passion or under excitement may be shown in mitigation, but cannot bar the action.

SAME.—*Husband and Wife.*—*Witness.*—In an action against husband and wife for slanderous words spoken by the wife;

Held, that the wife was a competent witness in her own behalf.

Held, also (ELLIOTT, J., dissenting), that the husband was a competent witness for himself.

APPEAL from the Ripley Circuit Court.

This was an action by Sarah A. Harding, the appellee, against the appellants, Herman Mousler and Nancy, his wife, for slanderous words spoken by said Nancy of the plaintiff.

An answer was filed consisting of four paragraphs. The first was a general denial. The second and third were in mitigation of damages, upon which issues were formed.

The fourth paragraph was pleaded in bar of the action, and alleged, that, before the uttering of the words stated in

the complaint, the plaintiff, in the presence of Mrs. Nelly Stening and other persons, stated that she loved said Herman and detested said Nancy; that she and said Herman were on the most intimate terms, and that said Herman visited her at her room, and she could and would separate the said Nancy and Herman. Which statements came to the knowledge of said Nancy, and she, being greatly provoked and grieved thereby, uttered said words without malice, wherefore, &c. A demurrer was sustained to this paragraph; to which the appellants excepted.

The trial of the cause by a jury resulted in a verdict for the plaintiff for two hundred dollars. A motion by the appellants for a new trial was overruled, to which proper exception was taken; and judgment was rendered on the verdict.

ELLIOTT, J.—The ruling of the circuit court in sustaining a demurrer to the fourth paragraph of the appellants' answer presents the first question upon which a reversal of the judgment is claimed.

That paragraph admits the speaking of the slanderous words charged in the complaint, but fails to justify them, or show by the averment of proper facts that they were not spoken in the slanderous sense charged in the complaint. The fact alleged in the paragraph, that the words were spoken when said Nancy was provoked and excited by what she was informed had been said concerning her and her husband, by the plaintiff, is not sufficient to rebut the presumption of malice arising from the speaking of the slanderous words charged, they being false in fact. That the words were spoken in the heat of passion or under excitement, might properly be shown in mitigation of damages, but not in bar of the action.

The appellants requested the court to instruct the jury as follows:

"1st. If, upon a consideration of the whole evidence, it

appears that the words were spoken in the heat of passion, without malice, and, if repeated, were repeated without malice, you should find for the defendants."

"2d. While the speaking of actionable words implies malice, it is still proper that you consider all the evidence in the case in determining the question whether the words that may have been proved to have been uttered were uttered maliciously or not. If they were not uttered maliciously, you should find for the defendants."

The instructions were refused, to which the appellants excepted. This ruling of the court is also urged as being erroneous.

We think there was no error in refusing to give the instructions as asked. They involve the same question, in substance, as that presented by the fourth parargraph of the answer, and what has been said in discussing that paragraph applies with equal force to these instructions. It is true, that malice is essential to render slanderous words actionable, but it is now the settled doctrine, that when words actionable in themselves are spoken in a criminal sense and are false, malice is implied from the speaking.

The instructions given by the court to the jury are in the record, and contain a full and fair statement of the law arising upon the pleadings and evidence in the case.

The only remaining questions in the case are based on the refusal of the court to permit either of the appellants to testify as a witness in the case.

It appears by a bill of exceptions that, at the proper time, the appellant Nancy offered herself as a witness in her own behalf in said cause, and offered to testify to the facts in mitigation of damages, set forth in the second and third paragraphs of the answer, and also that the slanderous words imputed to her in the complaint were not spoken by her; but the plaintiff objected to her being permitted to testify in the cause, for the reason, that, being the wife of Herman Mousler, the other defendant in the action, she was not a competent witness to prove any fact in the cause

on behalf of the defense, which objection the court sustained, and refused to permit her to testify as to any fact for the defense.

The appellant Herman also offered himself as a witness in his own behalf on said trial, and also offered to testify to the facts alleged in mitigation of damages in the second and third paragraphs of the answer, and that at the time said Nancy uttered the slanderous words charged in the complaint, she was laboring under great excitement, occasioned by rumors of certain defamatory words said to have been spoken by the plaintiff of her, said Nancy, and further, that he caused said Nancy to go with a mutual friend to the person to whom the words were spoken, to retract the same. But the evidence was rejected by the court, on the ground that said Herman, being the husband of his co-defendant, was not a competent witness in the case for the defense, and could not be permitted to testify therein to any fact for the defense. Proper exceptions were taken to these rulings.

The statute excludes the husband and wife as witnesses "for or against each other," but does not prohibit each from testifying in his or her own behalf; and when they are united in the same action, the evidence of one of them cannot be considered in determining the issue for the other.

In this case, we all concur in the opinion that the wife was a competent witness in her own behalf, and three of the judges unite in the opinion that the husband was also a competent witness for himself. In this opinion I cannot concur.

In *Carnie* v. *Murphy*, 28 Ind. 88, which was an action by husband and wife against a physician for malpractice in the treatment of the wife, the action sounding in tort, the court was equally divided on the question as to the right of the wife to testify as a witness.

And so in *Ward* v. *Colyhan*, 30 Ind. 395, which was a suit by husband wife for slanderous words spoken of the wife, this court was equally divided, as to the right of the wife to testify as a witness in her own behalf.

But in the case of *Albaugh* v. *James*, 29 Ind. 398, which was a suit against husband and wife, for the abduction of the wife of the plaintiff, it was held, that the defendants had each the right to testify in his or her own behalf, and that the fact that the testimony of one might tend to benefit the other is no reason for excluding the evidence; but it would be the duty of the court, by instructions, if asked, to limit the effect of the testimony to the case of the party testifying. See, also, *Crane* v. *Buchanan*, 29 Ind. 570.

In the case now before us, the cause of action is against the wife, for slanderous words spoken by her. The husband is properly joined as a party, and is responsible for the damages that may be recovered, but his liability is simply an incident of the marriage relation, and not for any act of his own; and if he should die pending the suit, the action would survive against the wife alone, and not against his personal representatives. The facts to which the husband offered to testify were in mitigation of the damages, and relate exclusively to the wife and her conduct, except the fact that the husband caused the wife to go the person to whom she had uttered the slanderous words and retract the same; but this act of the *husband*, however meritorious, could not go in mitigation of the damages, and hence was not proper evidence. *Yeates* v. *Reed*, 4 Blackf. 463. If the words were spoken in the heat of passion, and the wife afterwards went to the person to whom they were uttered and retracted the slanderous charge, such facts would be proper evidence for the wife in mitigation of damages. All the proper facts offered to be proved by the husband, in mitigation of damages, were direct evidence for the wife, and not for the husband, except as they might incidentally and unavoidably tend to release his liability resulting from the marital relation. The wife, in my opinion, had the right to testify, because the cause of action is directly against her, and for her individual act, and she would therefore be testifying directly for herself; and the fact that her evidence might incidentally and unavoidably tend to benefit the hus-

band, would be no reason for excluding it. But the husband's position is just the reverse; his evidence would be directly for the wife, and only incidentally for himself, and for that reason would, in my opinion, be incompetent.

Judgment reversed, with costs, and the cause remanded for a new trial.

W. S. Holman, for appellants.

S. M. Jones and *J. W. Gordon*, for appellee.

Plough *v.* Reeves and Others.

Execution.—*Motion for After Ten Years.—Assignment of Error.*—A proceeding to obtain leave of court to issue an execution on a judgment after the lapse of ten years from the entry thereof is a simple motion, to be heard by the court in a summary way, the only question being whether the judgment or any part thereof remains unsatisfied and due. No pleadings are required or contemplated by the statute, and the action of the court in striking out pleadings filed cannot be the basis of an assignment of error in the Supreme Court. If the judgment-defendant has any equities, or cross action, he must resort to his remedy by suit.

APPEAL from the Howard Common Pleas.

Gregory, C. J.—This is a motion for "leave of court" to issue an execution on a judgment after the lapse of ten years from the entry thereof.

Plough, the appellant, filed an answer in six paragraphs, the first of which was a denial that the judgment was unsatisfied. The court below, on motion, struck out the third and fourth paragraphs, to which the defendant excepted.

The defendant, on motion, was required to furnish the plaintiffs with a full and complete bill of particulars to each remaining special paragraph of the answer. The defendant excepted. On the failure of the defendant to comply with

the order, the court struck out the remaining paragraphs except the denial.

The issue was submitted to the court; finding for the plaintiffs; motion for a new trial overruled; and execution awarded on the judgment.

The section of the statute under which this proceeding was had is as follows: "After the lapse of ten years from the entry of a judgment, an execution can be issued only on leave of court, upon motion, after ten days personal notice to the adverse party." * * * * "Such leave shall not be given, unless it be established by the oath of the party, or other satisfactory proof, that the judgment, or some part thereof, remains unsatisfied and due." Acts 1867, p. 102, sec. 406.

No pleadings are contemplated or required in a proceeding of this kind. It is a simple motion, to be heard by the court, in a summary way; the only question being whether the judgment, or any part thereof, "remains unsatisfied and due."

If the judgment-defendant has any equities, or cross action, he must resort to his remedy by suit, in which pleadings and a trial by jury can be had. Therefore the action of the court below on the pleadings cannot be the basis for the assignment of error in this court.

Judgment affirmed, with costs.

C. N. Pollard and *H. A. Brouse*, for appellant.

J. W. Robinson, for appellees.

Plough *v.* Williams and Others.

Execution.—*Motion for after Ten Years.—Assignment of Error.*—In a proceeding to obtain execution upon a judgment of more than ten years standing, no pleadings are contemplated by the statute, and the action of the

court in rejecting answers filed in response to such a motion cannot be assigned in the Supreme Court as error.

APPEAL from the Howard Common Pleas.

RAY, J.—Proceeding to obtain execution upon a judgment of more than ten years standing.

There was an answer in six paragraphs. First, denial. Second, that certain notes of solvent parties had been placed in the hands of the judgment-plaintiff, to be by him collected and applied in discharge of the debt which was represented by the judgment, but that the said judgment-plaintiff had failed to account for the same; and asking credit therefor. Third, that by consent of judgment-plaintiff, the notes aforesaid were placed in the hands of his attorney for collection, the proceeds to be applied upon said judgment. Fourth, payment. Fifth, like the second, with an averment that sufficient time had elapsed for the collection of said notes. Sixth, in abatement, denying the existence of the plaintiff in the character in which he sued. A demurrer was sustained to the sixth paragraph of the answer, and overruled to the others. A motion to strike out the second, third, fourth, and fifth paragraphs was sustained as to the third and fourth, and overruled as to the second and fifth paragraphs. Interrogatories were filed by the defendant and rejected by the court. Trial, and finding for the appellees. Motion for new trial overruled, and judgment.

In the case of *Plough* v. *Reeves*, at this term, *ante*, p. 181, it was held, that in such a proceeding as this, no pleadings are contemplated by the statute, and that no error can therefore be assigned of the action of the court in rejecting answers filed in response to such a motion.

The judgment must therefore be affirmed, with costs.

C. N. Pollard and *H. A. Brouse*, for appellant.

J. W. Robinson, for appellees.

BINGHAM *v.* KIMBALL.

PLEADING.—*Answer.*—*Consideration.*—Suit on a promissory note. Answer, that the note was given by the defendant to the plaintiff, "without any consideration of any kind *to this defendant.*"

Held, that the answer was bad on demurrer.

SUPREME COURT.—*Weight of Evidence.*—The Supreme Court will not disturb a verdict upon the weight of the evidence of witnesses who testified before the court below.

APPEAL from the Marion Circuit Court.

GREGORY, C. J.—When this case was here before (17 Ind. 396), on a demurrer to the answer, the only point determined was, that the answer showed that the note was given for an existing debt against the Indiana State Board of Agriculture for lumber previously sold by the assignors of the appellee, and that therefore there was no consideration to support the note.

After the case was certified back to the court below, the appellant answered, among other things, that "the writing sued on in the complaint was given by this defendant to plaintiff's assignors without any consideration of any kind *to this defendant.*" A demurrer was sustained to this paragraph, and this is assigned for error.

It was not necessary that the consideration for the note should pass to the defendant. The consideration must be some benefit to the party by whom the promise is made, or to a third person at his instance; or some detriment sustained at the instance of the party promising, by the party in whose favor the promise is made.

The court below overruled the appellant's motion for a new trial, and that is complained of.

The evidence, which is in the record, is conflicting as to whom the credit was given to for the lumber, the balance of the purchase-money of which is the consideration of the note. The appellant testified, that the lumber was purchased by him as the agent of the Indiana State Board of

Agriculture, which fact was fully understood by the appellee's assignors, the payees of the note. The form of the note, to some extent, seems to corroborate this statement. But at least one witness testifies, that the credit was given solely to the appellant. Whatever we might think of the weight of the evidence, under the oft repeated rule of this court, we cannot disturb the verdict without overruling a long line of decisions.

Judgment affirmed, with costs.

J. E. McDonald, A. L. Roache, E. M. McDonald, T. A. Hendricks and *J. W. Nichol*, for appellant.

J. L. Ketcham, for appellee.

The Brooklyn Gravel Road Company *v.* Slaughter.

33 185
141 355

33 185
170 405

Pleading.—*Bill of Particulars.*—Where a complaint states, in the body of it, a good cause of action, specifying its nature, not upon a general account of several items, but upon one item alone, which is set out, it cannot, under the code, be objected to on demurrer, on the ground that no bill of particulars is made a part it.

Corporation.—*Contract of.*—A corporation can make no valid contract except such as relates to the business and objects of the corporation; and all such contracts must be made either by the board of directors or by a duly authorized agent or attorney.

Same.—*Officer.*—An individual officer of a corporation cannot by his acts bind the corporation, unless such acts are authorized or approved by the corporation.

APPEAL from the Morgan Circuit Court.

Frazer, J.—The first question made is upon the action of the court below in overruling the demurrer to the complaint. The specific point made here is, that no bill of particulars was made part of the complaint. There is nothing in the objection. Each paragraph of the complaint stated, in the body of it, a good cause of action, specifying its na-

ture. Neither proceeded upon a general account of several items, but upon one item alone, which was set out, and the statute (sec. 78 of the code) does not require this to be repeated by annexing it in the form of an account. No possible benefit to the defendant could result from such a requirement; and even if required, it would, in such a case, be matter of form only, and therefore no cause of demurrer under the code.

An issue was made by the general denial, upon the trial of which there was no evidence to sustain the first paragraph of the complaint, as it seems to us, though the finding for the appellee was upon it. Between the terminus of the defendant's road and the terminus, as constructed, of the gravel road of another corporation, The White River Valley Gravel Road Company, there was a space of some seventy rods. The work performed by the plaintiff consisted in grading and graveling this space. This was not done in pursuance of any contract with the defendant, but upon the faith of a conversation with the president of the defendant, in which the plaintiff was told by said president, that the latter would guarantee the payment, by persons interested in the White River road, of two hundred dollars for the work, and that he, said president, would vote to pay the balance, two hundred dollars, by the defendant. The president at the same time requested the plaintiff to do the work, if it could be done for about four hundred dollars. The defendant's corporation never took action on the subject. A sum, one hundred and fifty dollars, was afterwards paid to the president of the defendant on account of the work, by persons interested in the White River company. Instead of handing the money to the plaintiff, he applied it in the discharge of debts held against his own company. He did this because, as he testified, he "understood" that this company would pay the plaintiff for his whole work, though the evidence shows that there was no reason for any such understanding. The president had no authority whatever to bind the defendant to pay for any part of the work.

Indeed, the defendant had no franchise authorizing it to do the work, and it has never claimed it as part of its road. After its completion, the two corporations built a joint toll-house at the terminus of the White River road, but in doing so the defendant was careful to declare that it did not thereby recognize the seventy rods as part of its road, or its liability to pay for any part thereof. It had never collected tolls upon it.

But the court refused the following instruction to the jury, prayed by the appellant:

"2d. A corporation can make no valid contract except such as relates to the business and objects of the corporation; and all such contracts must be made either by the board of directors or a duly authorized agent or attorney."

It also refused the following:

"3d. An individual officer of a corporation cannot, by his acts, bind the corporation, unless such acts are authorized or approved by the corporation."

It seems to us that these instructions should have been given. They were applicable to the evidence, and clearly the law.

Reversed, with costs, and remanded for a new trial.

A. Ennis, for appellant.

W. R. Harrison and *W. S. Shirley*, for appellee.

Reitz *v.* The State, on the Relation of Holden.

Change of Venue.—*Rule of Court.*—By a rule of a circuit court, all affidavits for a change of venue were required to be filed one day before the cause was set on the docket for trial or within one day after the issues were closed. After the time so limited, an application was made by the defendant in a prosecution for bastardy in said court, for a change of venue on the ground of prejudice in the county against the defendant, and also prejudice of the presiding judge. The application to remove the case to anoth-

er county was refused, but another judge was called to preside at the trial, the defendant objecting.

Held, that there was no error.

EVIDENCE.—*Bastardy.*—*Error Cured.*—On the trial of a prosecution for bastardy, the child, with the paternity of which the defendant was charged, being present in court, the defendant on cross examination said, "The child is not mine; I have one at home that looks more like me than this child." The counsel for the relator then, over the defendant's objection, was permitted to hold the child up before the jury for inspection by them, as evidence to prove that the child favored the defendant, the court remarking, that as the child had been in the presence of the jury during the trial, they could not be prevented from looking at it; and immediately thereupon, before the argument of counsel, and also in an instruction to the jury after the argument, the court told the jury that in considering and determining the case, they must look to and consider only the oral testimony, and not the resemblance or non-resemblance of the child to the defendant.

Held, that the error in the admission of the improper evidence was cured.

APPEAL from the Marion Civil Circuit Court.

RAY, J.—Prosecution for bastardy. By a rule of the Marion Civil Circuit Court, all affidavits for a change of venue are required to be filed one day before the cause is set on the docket for trial or within one day after the issues are closed. After the time limited by this rule, an application for a change of venue was made, on the ground of prejudice existing in the county against the appellant, and also an alleged prejudice on the part of the presiding judge. The motion to remove the case to another county was refused, but another judge was called to preside on the trial. The appellant objects to the refusal to grant the change from the county, and also to the granting of his motion for a change from the judge. The latter motion is not entitled to consideration, so long as the legislature permits such affidavits to be addressed to the courts. The rule under which the change from the county was refused has been held valid by this court, in *Galloway* v. *The State*, 29 Ind. 442.

The bill of exception states that the child, with the paternity of which the appellant was charged, being present in court, the appellant on cross examination stated, "The child is not mine. I have one at home that looks more like me than this child." The record proceeds: "The coun-

sel for the relator then produced the child, and holding it up before the jury, offered the same for the inspection of the jury, as evidence to prove that the child favored the defendant, to which the defendant objected; the court overruled the objection, to which the defendant excepted; the court remarking, that as the child had been in the presence of the jury all the time during the trial, they could not be prevented from looking at it; and immediately thereupon and before the argument of counsel, the court informed the jury that in considering and determining the case they must look only to and consider the oral testimony, and not the resemblance or non-resemblance of the child to the defendant." This was more distinctly repeated in an instruction to the jury at the close of the argument of counsel.

This withdrawal of the improper evidence from the jury must be held to have cured the error in its admission. Especially ~~is~~ this true where the language of the appellant has invited the very comparison between the reputed father and child of which he complains.

Judgment affirmed, with costs.

I. Klingensmith and *C. Coulon*, for appellant.

J. S. Harvey, *N. Van Horn*, *F. M. Finch*, and *J. A. Finch*, for appellee.

The State v. Henning.

53 189
146 121

Criminal Law.—*Prosecuting Attorney.—Bribery.*—A prosecuting attorney is an officer entrusted with the administration of justice, within the meaning of section 39 of the act defining felonies, &c., 2 G. & H. 450.

Same.—*Compounding Crime.—Indictment.*—An indictment under section 2 of the act in relation to the compounding and concealing of crimes, &c., Acts 1867, p. 104, must charge that the defendant had knowledge of the actual commission of the crime which it is alleged he agreed to compound, conceal, &c.

The State *v.* Henning.

SAME.—*Jurisdiction.*—*Vanderburgh Criminal Circuit Court.*—A grand jury was impanelled in the Circuit Court of Vanderburgh county, and an indictment was returned by said jury into said court, after the act creating the Vanderburgh Criminal Circuit Court went in force, but before the first term of the latter court.

Held, on motion to quash, in the Vanderburgh Criminal Circuit Court, to which the case was transferred, that the court in which the indictment was found had no jurisdiction of the subject-matter.

APPEAL from the Vanderbugh Criminal Circuit Court.

GREGORY, C. J.—The appellee was indicted in the court below for bribery. The indictment charges, that on, &c., William Henning was prosecuting attorney of the Fifteenth Judicial Circuit of the State of Indiana, and was then and there acting as such; that on, &c., at the said county, one Herman Becker was and had been guilty of violating the law of said state by unlawfully bartering and selling intoxicating liquor by a less quantity than a quart at a time in said county, without having a license for that purpose. And the grand jurors of the said county being at that time in session, and the said Herman Becker greatly fearing that he would be indicted by said grand jury for said offense, to prevent any indictment from being found against him, the said Becker had an interview and a conversation with said Henning, in reference to said prosecution against the said Becker, and the said William Henning, so being prosecuting attorney, did then and there unlawfully, corruptly, and feloniously, take and receive from the said Herman Becker, a large sum of money, to wit, the sum of five dollars in lawful currency of the United States, as an undue reward to influence his behaviour in office as such prosecuting attorney, and to induce him to prevent the said grand jurors from finding an indictment against the said Becker for the offense aforesaid.

On motion, the indictment was quashed. The State appeals.

This indictment, if sustained, must be held good under section 39 of the act defining felonies, and prescribing punishment therefor. 2 G. & H. 450. It lacks a material aver-

ment to make it good under section 2, of the act of March 11th, 1867, in relation to compounding crimes. It is not charged that the defendant had knowledge of the actual commission of the crime of Becker.

The turning point in the case is this: Is a prosecuting attorney an officer entrusted with the administration of justice?

He is a judicial officer created by the constitution of the State. 1 G. & H. 47, sec. 11.

He is the law officer of the court to whom is entrusted all prosecutions for felonies and misdemeanors. 2 G. & H. 430, sec. 4.

He is the legal adviser of the grand jury.

We think he is "an officer entrusted with the administration of justice."

But the action of the court below must be sustained, for the reason that the court in which the indictment was found had no jurisdiction of the subject-matter.

On the 13th of May, 1869, the act creating the Vanderburgh Criminal Court was approved; it is therein declared to be in force from and after its passage. The indictment was returned into the Vanderbugh Circuit Court on the 21st of May, 1869, by a grand jury impanelled therein on the 18th of that month. The case was transferred to the Vanderburgh Criminal Court, where the indictment was quashed.

It is admitted by counsel for the State, that the latter court had exclusive jurisdiction of the offense charged, but it is insisted that from the creation of the court until its first term, the Vanderburgh Circuit Court retained its former jurisdiction. This position is not tenable. Certainly the grand jury of the criminal court could enquire of all offenses of which that court had jurisdiction from the time of its creation. There was at all times after its creation a court having jurisdiction to punish the offender for the crime charged. That the court was not in session, is no reason why the circuit court should retain its former juris-

diction. The offender could have been held to bail to answer in the criminal court at its next term.

The judgment is affirmed.

D. E. Williamson, Attorney General, and *A. L. Robinson*, for the State.

J. M. Shackelford and *W. F. Parrett*, for appellee.

Scott and Another *v.* Green.

APPEAL from the Carroll Common Pleas.

Ray, J.—Suit by Green against Alexander Chittick, on a note. John Scott and Mrs. Elizabeth Chittick were garnishees. Judgment by default against the debtor, and a joint judgment against the garnishees, from which the latter appeal. The question presented is on the evidence, and, after a careful examination, we find no proof showing any indebtedness from the garnishees to the judgment defendant at the date of the service of the writ upon them.

The judgment against the appellants John Scott and Elizabeth Chittick is reversed, and the cause remanded for a new trial as to them. Costs here.

B. B. Daily, *D. B. Graham*, *S. E. Perkins*, *L. Jordan*, and *S. E. Perkins, Jr.*, for appellants.

J. Applegate, for appellee.

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33 192
134 268

33b 192
140 135

33b 192
155 503

Baragree *v.* Cronkhite and Others.

Injunction.—*Justice of the Peace.*—*Appeal.*—An injunction will not lie to restrain proceedings on a judgment rendered by a justice of the peace, where

the party seeking the injunction has had an opportunity to take an appeal from the judgment, and full relief could have been obtained on such appeal; or where, by an application to the circuit court or court of common pleas, an appeal may be authorized after the lapse of the time limited therefor, under section 68, 2 G. & H. 597.

SAME.—*Attachment.*—An injunction will not lie in favor of the defendant in attachment to restrain proceedings on a judgment rendered against him therein, where a part of the indebtedness for which the judgment was rendered is admitted to be due, and no offer is made to pay such portion.

APPEAL from the Warren Common Pleas.

This was a suit by the appellant against the appellees for an injunction.

The complaint was in two paragraphs, the first of which alleged, that on the 6th of March, 1867, the plaintiff left his residence in said Warren county and went to Lafayette and Fort Wayne, Indiana, for an indefinite period of time; that he returned home on the 21st of the same month; that during his said absence the defendant Cronkhite, on the 11th of March, commenced an action against the appellant, before the appellee Tharp, a justice of the peace of said county, and on the same day said justice issued a summons in favor of said Cronkhite and against the appellant, which was made returnable on the 15th of March, 1867; that said summons was delivered to the appellee Shanks, a special constable appointed by said justice, to be served; that at the time said constable received said summons, and at the time he pretended to serve it upon the appellant, it was well known to said Cronkhite, and said justice, and said constable, that the appellant was absent from home for an indefinite period of time; and that fact was well known to them. also at the time judgment was rendered by said justice against the appellant and in favor of said Cronkhite, on the 15th of March, 1867; that there was no other service or pretended service of notice to the appellant of the pendency of said action than a copy of said summons left at the house of the appellant by said constable, during the said absence of appellant from home for an indefinite period, which was also

well known to said justice and said Cronkhite at the time said justice rendered said judgment; that on the 13th of March, 1867, Cronkhite, upon affidavit and bond filed with said justice, procured him to issue a writ of attachment against the property of the appellant, which writ was placed in the hands of said constable for service, upon which said constable attached all the property of the appellant, amounting to about five hundred dollars, which was by said justice ordered to be sold; that the appellees Robert Hamilton, William L. Hamilton, and Hanmon, filed claims and affidavits and bonds in attachment against the appellant under said proceeding instituted by Cronkhite, and, upon the same kind of service as that had in favor of Cronkhite, all of said plaintiffs, having full knowledge at the time of service that appellant was absent from home for an indefinite period of time, caused and procured said justice to render judgment in their favor against the appellant; and said justice and said plaintiffs, with full knowledge of all the facts aforesaid, rendered, and caused to be rendered, a judgment and order for the sale of the appellant's property attached; which order was placed in the hands of said constable for service; that said constable had caused said property to be advertised for sale on the 1st of April, 1867, and the appellees were threatening to sell the same at that date; that the appellant had no knowledge of said proceedings, until his return on the 21st of March, and made no appearance to said action, nor did any one appear thereto on his behalf; that said proceedings were unlawful, oppressive, and of great damage to appellant; wherefore, &c.

The second paragraph is like the first, with the additional averments, that the plaintiffs in said attachment proceeding combined and confederated together to sue him in his absence from home, and without his knowledge take judgments against him upon claims, some due and some not due, and attach his property and sacrifice it; in pursuance of which purpose, the acts, set forth as in the first paragraph, were done, with the full knowledge on the part of

the justice, constable, and plaintiffs that appellant was absent from home for an indefinite period.

The court sustained a demurrer to each paragraph of the complaint, for want of sufficient facts, and this is assigned as error.

RAY, J.—According to the dates given, an appeal could have been taken from the judgment rendered by the justice, and full relief obtained on such appeal. But if this were otherwise, section 68, p. 597, 2 G. & H., affords the proper remedy, that is, by an application to the circuit court or court of common pleas, where an appeal may be authorized after the statutory limit for taking the same has been passed without the fault of the party asking the relief. But in the case before us no right to the interposition of a court of equity is shown, as a part, at least, of the indebtedness is admitted to be due, and no offer is made to pay such portion.

Judgment affirmed, with costs.

J. H. Brown and *G. D. Wagoner*, for appellant.

L. T. Miller and *J. Park*, for appellee.

CITY OF COLUMBUS and Others *v.* STOREY and Others.

INJUNCTION.—*City.—Street Improvement.*—The common council of a city by ordinance changed the grade of a street, bordering upon which was a valuable mill property, in front of which the street was cut down, in making said change, about twenty-one inches, so that about twenty-five dollars would be the expense of restoring as convenient access to the mill yard as existed before the change. Suit by the owner of said mill property to enjoin the completion of the work, the complaint being filed after the street had been so cut down and when, in order to complete the work, it only remained to put on the gravel, said owner's damages occasioned by the change not having been assessed or tendered to him.

Held, that there was no ground for an injunction.

APPEAL from the Bartholomew Common Pleas.

GREGORY, C. J.—This is an appeal from an interlocutory order restraining the defendants from completing the grade of Harrison street, in the city of Columbus.

The case was heard on affidavits filed by the parties.

The complaint is, that the Common Council of the city of Columbus have by ordinance changed the grade of Harrison street; that Storey is the owner of a valuable mill property bordering thereon; that by the change of grade the access from the street to the mill yard is obstructed; that Storey will thereby sustain irreparable damage; that the defendants are progressing with the work according to the grade as changed; that the plaintiff's damages have not been assessed and tendered to him.

The facts, as disclosed on the hearing, do not make a case for an injunction.

The cut along Storey's property is only about twenty-one inches; and a very small expense, not to exceed twenty-five dollars, will restore the access to the mill-yard, making it as convenient as it was before the change. At the time this complaint was filed, the street had been cut down the full depth required by the change, and it only remained to put on the gravel to complete the work. The damage to the appellee Storey would have been greater by leaving the street in that condition, than by completing the work by putting on the gravel.

It may be that Storey has a right of action growing out of the fact that his damages resulting from the change of grade were not assessed and tendered him before the work was done. But, clearly, a court of equity ought not to interpose by injunction to prevent the completion of the improvement of Harrison street according to the new grade.

It is the duty of the court to look to consequences, before granting an injunction.

The order granting an injunction is reversed, at the costs of appellees. Cause remanded for further proceedings.

S. Stansifer and *F. Winter*, for appellants.

R. Hill and *G. W. Richardson*, for appellees.

Day v. Herod.

33 197
136 451

83 197
148 568

33 197
168 487

County Commissioners.—*Appeal.*—A board of county commissioners dismissed a proceeding to contest the election of a county commissioner; whereupon the contestor prayed an appeal to the circuit court, and filed an appeal bond within proper time, which was approved by the county auditor, who failed to file the transcript and papers in the office of the clerk of said court within twenty days after the filing of said bond, and until the expiration of two months.

Held, that this delay of the auditor was not good cause for the dismissal of the appeal by the circuit court. *Barnes* v. *Modisett*, 3 Blackf. 253; *Brown* v. *Modisett*, *id.* 381; and *Butler* v. *Shomp*, *id.* 392, overruled.

APPEAL from the Putnam Circuit Court.

Frazer, J.—This was a contest of the election of a county commissioner. The board of commissioners dismissed the cause on the 10th of November, 1868; whereupon the contestor, who is appellant here, prayed an appeal to the circuit court, and filed an appeal bond at once, which was approved by the auditor. The auditor did not file the transcript and papers in the office of the clerk of the circuit court until the 9th day of January, 1869. The circuit court dismissed the appeal.

The statute requires, that "within twenty days after the filing of such appeal bond, the auditor shall make out a complete transcript of the proceedings of said board, relating to the proceeding appealed from, and shall deliver the same, and all the papers and documents filed in such proceeding, and the appeal bond, to the clerk of the court to which the appeal is taken." 1 G. & H. 253, sec. 33. The right of appeal is given upon filing an approved bond. *Id.* sec. 31, 32; *id.* 319, sec. 20. Is this right lost to the party by the misconduct or negligence of an officer over whom the party has no control, in not doing his duty within the time required by law?

We have recognized the general rule to be, as held in *The People* v. *Allen*, 6 Wend. 486, that where a statute requires an official act touching the rights of others to be

performed within a specified time, it will be deemed directory unless the nature of the act to be performed or the language of the statute shows that it was intended that the act should not be performed after the time limited. *Nave* v. *King*, 27 Ind. 356. In this instance, the statute has no negative words—nothing to indicate an intention that the auditor having failed, within the time, to do the duty imposed upon him, should not perform it afterwards; nor, indeed, is the act itself of such a nature that it should not be done after the time fixed. Indeed, it is scarcely susceptible of belief that the legislature intended that the right of appeal should be cut off by the negligence of the auditor to do his duty in apt time. It is pre-eminently the policy of our legislation to allow the largest liberty of litigation, to the very verge of vexation—nay, possibly even beyond it. Controversies involving the merest trifles may be carried by appeal from the lowest to the highest of our courts; nor are these tribunals permitted, ordinarily, to postpone them even for the purpose of giving attention to causes of real importance. It may be said that the wisdom of this policy is open to serious question; but it must be remembered that such a suggestion, however weighty when addressed to the legislature, should have little influence in the courts, whose function does not extend to altering or disregarding unwise laws, but is confined to administering, in the sense intended, such enactments as they find upon the statute books. This general policy of our legislation affords some aid in ascertaining what was intended to be accomplished by the statute immediately under consideration.

We are aware that a question precisely like the one before us was at an early day decided the other way by this court. *Barnes* v. *Modisett*, 3 Blackf. 253; *Brown* v. *Modisett*, *id.* 381; *Butler* v. *Skomp*, *id.* 392. These cases arose under a statute like the one under consideration, requiring justices of the peace in case of appeal from their judgments to file a transcript, &c., in the circuit court within a certain time, and it was held, we think without very full examina-

tion, that a failure of "the justice to do this duty within the time prescribed cut off the appeal." Very soon after the publication of the volume containing these cases, the legislature interfered by an express enactment preventing such a result, and we believe that there has since been no opportunity for the further consideration of the exact question in this court, until now. Illinois borrowed from us the statute upon which these cases were decided, and the same question arising, the Supreme Court of that State at first followed these Indiana cases. *Campbell* v. *Quinlin*, 3 Scam. 288. But upon fuller argument, that court afterwards overruled *Campbell* v. *Quinlin*, as being obviously wrong, and held that the failure of the justice in the performance of a ministerial duty did not defeat the appeal. *Little* v. *Smith*, 4 Scam. 400.

The principle applicable to the subject was stated by Lord MANSFIELD, in *Rex* v. *Loxdale*, 1 Burr. 445; and the distinction between cases where time *is* and is *not* of the essence of the thing required to be done by a statute is well shown in the *Thames Manuf. Co.* v. *Lathrop*, 7 Conn. 550. See, also, *Colt* v. *Eves*, 12 Conn. 243.

Reversed, with costs; cause remanded, with directions to reinstate the cause and proceed.

J. Hanna and *F. Knefler*, for appellant.

J. A. Matson, *C. C. Matson*, *D. E. Williamson*, and *A. Daggy*, for appellee.

BARNETT *v.* GILMORE.

33	199
136	451
33	199
163	487

COUNTY COMMISSIONERS.—*Appeal.*—A. contested the election of B. as county treasurer. The latter appealed from the decision of the county commissioners to the circuit court, and in proper time filed a bond, which contained no penalty, with the auditor, who failed to file a transcript and the papers in the cause in the office of the clerk of said court for more than fifty days af-

ter the bond was filed. In the circuit court, B. moved to dismiss the cause, pending which motion, A. moved to dismiss the appeal. The latter motion was sustained, after which B. tendered a proper bond and asked to have the appeal reinstated, which the court refused.

Held, that said motion to dismiss the appeal had precedence over said motion to dismiss the cause.

Held, also that the failure of the auditor to file the transcript and papers in the clerk's office within twenty days after the appeal was taken was no cause for the dismissal of the appeal.

Held, also, that the fact that the appeal bond contained no penalty was good cause for dismissing the appeal.

Held, also, that the offer to file a new bond, if allowable at any time, came too late after the appeal had been dismissed.

APPEAL from the Putnam Circuit Court.

ELLIOTT, J.—In this case, Gilmore contested the election of Barnett to the office of county treasurer. Gilmore succeeded before the board of county commissioners, and Barnett appealed to the circuit court, and filed a bond with the auditor the day after the decision was made. The bond, however, contained no penalty. The auditor failed to file a transcript of the proceedings before the commissioners and the papers in the case, in the clerk's office of the circuit court, for more than fifty days after the bond was filed.

In the circuit court, Barnett moved to dismiss the case, on the ground that there was no sufficient cause of contest. Pending that motion, Gilmore moved to dismiss the appeal, for the reasons, first, that no bond was filed authorizing an appeal; and second, because the transcript and papers were not filed in the clerk's office within twenty days after the appeal was taken. The court dismissed the appeal, to which Barnett excepted. Afterwards Barnett tendered a proper bond, and asked to have the appeal reinstated, which the court refused to do, to which an exception was also taken.

Barnett appeals.

The motion to dismiss the appeal had precedence over the motion of the appellant to dismiss the cause.

The failure of the auditor to file the papers and transcript in the clerk's office within twenty days after the ap-

peal was taken was no cause for the dismissal of the appeal. *Day* v. *Herod*, at the present term, *ante*, p. 197.

The appeal bond was defective, as it contained no penalty, and the appeal was properly dismissed for that reason. The offer to file a new bond, if allowable at any time, came too late after the appeal had been dismissed, and there was no error in refusing to reinstate the appeal.

Judgment affirmed, with costs.

J. J. Smiley, *W. Neff*, *S. Claypool*, *J. A. Matson*, and *C. C. Matson*, for appellant.

W. A. McKenzie, *D. C. Donnohue*, *D. E. Williamson*, and *A. Daggy*, for appellee.

Eitel *v.* The State.

33 201
136 543
33 201
144 320
145 311

Criminal Court.—*Of Jefferson County.*—*Constitutional Law.*—There is no constitutional objection to such special legislation as that by which the Criminal Circuit Court of Jefferson County was created (Acts 1869, p. 49); and it was immaterial to the valid existence of said court whether said county had such a population as under other acts would have authorized the organization of the court.

Same.—*Grand Jury.*—Said court had all the machinery of the circuit courts for the disposition of criminal causes, including a grand jury.

Same.—*Jurisdiction.*—*Misdemeanors.*—The criminal courts of this State have jurisdiction of misdemeanors.

Same.—*Indictments for Misdemeanors.*—Misdemeanors may, in the criminal and circuit courts, be prosecuted upon indictment.

Criminal Law.—*Desecration of the Sabbath.*—*Indictment.*—An indictment charged that the defendant, at, &c., "being over fourteen years of age, on the 13th of June, 1869, being Sunday, was found unlawfully at common labor, engaged in his usual avocation, to wit, selling and delivering to" J. O. "two quarts of beer, and receiving from him twenty-five cents in payment therefor," &c., the statutory exceptions being negatived.

Held, on motion to quash, that the indictment sufficiently charged an act of common labor, within the meaning of the statute. *Wetzler* v. *The State*, 18 Ind. 416, criticised.

APPEAL from the Jefferson Criminal Circuit Court.

FRAZER, J.—The question most pressed in the argument is, whether the Jefferson Criminal Circuit Court has a valid existence. The constitutional question, heretofore decided by this court (*Combs* v. *The State*, 26 Ind. 98), as to the power of the legislature to create such a court, is not presented. That question has recently been again considered in a case not yet decided (*Clem* v. *The State**), and will be further discussed and, we trust, finally settled in that case.

The criminal court for Jefferson county was called into existence by a special statute (Acts 1869, Spec. Sess., p. 49); and it is unnecessary, therefore, to consider whether that county had such a population as under other acts would have authorized its organization. There is no constitutional objection to such special legislation.

The criminal court has, by law, all the machinery of the circuit courts for the disposition of criminal causes, and this, of course, includes a grand jury. *Id.* 50, sec. 1.

The criminal courts are invested with jurisdiction of misdemeanors. Acts 1867, p. 78.

There is no doubt entertained by this court that misdemeanors may, in the circuit and criminal courts, be prosecuted upon indictment.

The foregoing propositions determine questions presented in this cause. We have not thought it necessary or useful to extend this opinion by entering into a fuller discussion of them. The questions themselves have found their origin in the fact that it seems to have been thought that local legislation could be best accomplished by enactments general in terms and form, though necessarily local in substance and application. It may have been apprehended that there was some constitutional restriction which would be fatal to acts which were in terms local, but which could be evaded by giving them a general form and yet a local application.

It is contended that the indictment should have been

*Post, page 418.

quashed for insufficiency. It charged that the defendant, at, &c., "being over fourteen years of age, on the 13th day of June, 1869, being Sunday, was found unlawfully at common labor, engaged in his usual avocation, to wit, selling and delivering to J. O. two quarts of beer, and receiving from him twenty-five cents in payment therefor," &c., proceeding to negative the exceptions contained in the statute.

Liquor may be sold lawfully, but gambling is always an unlawful act; and hence we think that *The State* v. *Conger*, 14 Ind. 396, is not an authority applicable to the present question.

But it is suggested that there is no averment that selling beer was the usual avocation of the appellant, and *Wetzler* v. *The State*, 18 Ind. 416, is cited. That case decided no question of pleading, though a doubt was expressed as to the sufficiency of the information in that case. We do not entertain that doubt. Courts know judicially, without averment or proof, that selling merchandise is common labor, whether it be cigars as in that case, or beer as in this. It is secular business and was intended to be reached by the statute. *Reynolds* v. *Stevenson*, 4 Ind. 619, and cases there cited.

The evidence was sufficient to warrant a conviction.

Affirmed, with costs.

E. R. Wilson and *J. L. Wilson*, for appellant.

D. E. Williamson, Attorney General, for the State.

Mayer *v.* The State.

Criminal Law.—*Desecration of the Sabbath.*—*Evidence.*—If, on the trial of an indictment for desecrating the Sabbath by selling an article, there is a reasonable doubt as to whether the transaction was a sale or a gift, there can be no conviction.

APPEAL from the Jefferson Criminal Circuit Court.

FRAZER, J.—All the questions now presented, except such as are hereinafter specially alluded to, were considered in *Eitel* v. *The State, ante*, p. 201, and decided adversely to the appellant.

The court refused to instruct the jury, that "the State is required to prove all the material facts charged, beyond a reasonable doubt; * * and if there is a reasonable doubt as to whether the liquor received and drunk was a sale or a gift, this rule applies."

It seems to us that this instruction should have been given, and that the error in refusing it requires us to reverse the judgment.

We do not perceive any other error in this record.

Reversed, and remanded for a new trial.

J. L. Wilson and *E. R. Wilson*, for appellant.

D. E. Williamson, Attorney General, for the State.

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WEIS *v.* THE STATE.

CRIMINAL COURT.—*Of Jefferson County.—Constitutional Law.—Grand Jury.*—The act creating a criminal circuit court in Jefferson county (Acts 1869, p. 49) was constitutional and conferred on said court legal power to organize and impanel a grand jury.

LIQUOR LAW.—*Evidence.—Beer.*—On the trial of an indictment for selling intoxicating liquor to a minor, the evidence showed that the liquor sold was beer, but failed to show that it was malt beer, or that it was an intoxicating liquor.

Held, that this failure rendered the evidence insufficient.

APPEAL from the Jefferson Criminal Circuit Court.

ELLIOTT, J.—Weis, the appellant, was indicted, tried, and convicted, in the Jefferson Criminal Circuit Court, for selling intoxicating liquor to one Henry Cole, a minor.

A reversal of the judgment is sought on two grounds:

First, that the act creating the court is unconstitutional and void, and, if valid, does not authorize the organization of a grand jury.

Second, that the evidence does not sustain the conviction.

All the points involved in the first question were carefully examined in *Eitel* v. *The State, ante*, p. 201, in which we held, that the act creating criminal circuit courts in Jefferson and Vanderburg counties was constitutional, and that it conferred on said courts legal power to organize and impanel grand juries. We are still satisfied with the correctness of the ruling in that case, and we do not, therefore, deem it necessary to re-discuss the questions here.

On the second question, the judgment must be reversed. The evidence does not show that the liquor sold was intoxicating. The only evidence on the subject was that of Cole, the prosecuting witness, who testified that he was under twenty-one years of age, and some time during the summer bought "a glass of beer" of the appellant, and paid for it. There was no evidence that it was malt beer, or that it was an intoxicating liquor. Under the statute, "malt liquors" are included in the term "intoxicating liquors." *Beer* may be, but is not necessarily, a malt liquor, and may not be intoxicating. It devolves on the State, therefore, to prove that the beer sold was either a malt liquor or that it was, in fact, intoxicating liquor. Neither of these facts could be assumed or judicially recognized. As no such proof was made, the evidence was not sufficient to warrant a conviction.

Judgment reversed, and the cause remanded for a new trial.

J. L. Wilson and *E. R. Wilson*, for appellant.

D. E. Williamson, Attorney General, for the State.

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WILES *v.* THE STATE.

CRIMINAL COURT.—*Of Jefferson County.—Grand Jury.*—The act creating the Criminal Circuit Court of Jefferson County (Acts 1869, p. 49) was valid, and authorized the impanelling of a grand jury in said court.

LIQUOR LAW.—*License.*—A license to sell intoxicating liquors in a less quantity than a quart at a time, or to sell intoxicating liquors to be drunk in the vender's house, out-house, &c., cannot be made to take effect before the date at which it is issued.

SAME.—*Judicial Notice.—Ale.*—A court judicially recognizes the fact that ale is a malt liquor.

SAME.—*Evidence.—Venue.—Time.*—A person was tried and convicted in Jefferson county, in this State, in January, on an indictment found in said county in the same month, for retailing, at that county, intoxicating liquor without a license. The prosecuting witness testified (as shown by a bill of exceptions), that he bought the liquors of the defendant, "at his place of business in North Madison, in said county, during the week between Christmas and New-Year's."

Held, that it sufficiently appeared that the sale was made within two years before the finding of the indictment, and that it occured in Jefferson county, in this State. *Jackson* v. *The State*, 19 Ind. 312, disapproved.

APPEAL from the Jefferson Criminal Circuit Court.

ELLIOTT, J.—Wiles, the appellant was indicted in the Jefferson Criminal Circuit Court for selling one gill of intoxicating liquor at said county, on the first day of December, 1869, to George W. Ball, for ten cents, to be drunk, and which he suffered to be drunk in his house; "he, said Nicholas Wiles, not being then and there licensed, according to law, to sell intoxicating liquor by a less quantity than a quart at a time."

A motion to quash the indictment was overruled. Plea, not guilty. The case was tried by the court, by agreement of the parties. The appellant was convicted and fined five dollars. Motion for a new trial overruled, and judgment.

It is contended that the court erred in overruling the motion to quash the indictment, for the reasons that the act creating the Jefferson Criminal Circuit Court is void, and that it does not authorize the empanelling of a grand jury in said

court. These questions were examined, and decided in favor of the validity of the court and of its power, under the act, to organize a grand jury, in *Eitel* v. *The State, ante*, p. 201, and need not be further noticed in this case.

The prosecuting witness testified that he purchased ale of the appellant, at his place of business in said county, by the drink, and drank it in his house, during the week between Christmas and New-Year's. At the close of the evidence on the part of the State, the appellant gave in evidence a license, issued by the county auditor, dated January 7th, 1870, certifying that the appellant, having been granted a license to sell spirituous liquors, by the board of commissioners of Jefferson county, and also having filed in said auditor's office the county treasurer's receipt for fifty dollars, he was therefore licensed and permitted to sell intoxicating liquors in a less quantity than a quart at a time, with the privilege of permitting the same to be drunk on his premises in Washington avenue, North Madison, for one year from the 7th of December, 1869.

The State thereupon introduced the auditor of the county, who issued said license, and proved by him that it was issued from his office at the date thereof, on which day the appellant paid the fifty dollars mentioned in the license, and not before; but that the order of the county commissioners granted license to the appellant from the 7th day of December, 1869, as stated in the license.

This evidence was allowed over the appellant's objection, and its admission is assigned for error.

We think there was no error in admitting the evidence, though we fail to see that it was of any material benefit to the prosecution. It did not contradict anything shown by the license. It corroborated the fact that the license was issued at the time of its date, but, in the absence of contradictory evidence, that fact conclusively appeared by the license itself, and the evidence did not, therefore, in any manner prejudice the appellant.

Under the statute, a person desiring license to sell intoxicating liquors by retail is required to make an application to the board of county commissioners for that purpose, having first given the notice of such application required by the statute and made the proper proof of that fact, and then, upon making satisfactory proof to the board that he is a man of good character and fit to be trusted with a license, an order is made authorizing a license to issue, upon the applicant's giving the bond and paying the fee required by the statute. The money is required to be paid to the county treasurer, and the bond filed with, and approved by, the auditor, and upon the execution of the bond as required, and the presentation of the order of the board and the treasurer's receipt for the fees, the auditor issues the license. The order of the county board is not the license, nor does it alone confer the power to retail. It is but one of the preliminary steps in procuring the license. The order may be made, but the applicant may refuse to pay the fee or execute the bond, without which he is not entitled to the license. It is the license itself, properly procured, that confers the right to retail under the statute, and until it is issued no such right is conferred. *Schlict* v. *The State*, 31 Ind. 246. It is made a penal offense to sell intoxicating liquors by a less quantity than a quart at a time, or to sell in any quantity to be drunk or suffered to be drunk in the vender's house, out house, &c., without such license, and it is not in the power of the county board or the auditor to grant a license extending back to a prior date, so as to cover offenses already committed. The license can only take effect from the date it is issued.

It is also claimed that the evidence does not justify the finding. The first ground of objection is, that there was no evidence that the liquor sold was intoxicating. It was proved to be ale. The statute declares, that the words "intoxicating liquors" as used in the act shall apply to any spirituous, vinous, or malt liquor, &c., and the courts will

judicially recognize the fact that ale is a malt liquor, and its sale by retail inhibited, without a license.

It is also insisted that the evidence does not show that the sale was made within two years next before the finding of the indictment, or that it occurred in Jefferson county, in this State. The evidence of Ball, the prosecuting witness, is stated in the record thus: "The prosecution proved by George W. Ball, that witness knows the defendant, and bought ale of the defendant by the drink, at his place of business in North Madison, in said county, during the week between Christmas and New-Year's. Witness don't recollect how much ale he bought of the defendant, but perhaps five or six drinks, and drank it in his house and paid first."

It is apparent that no care was used in taking down the evidence in the language of the witness. But there is certainly no ground for the objection that the venue was not sufficiently proved. The indictment was found in Jefferson county, Indiana. It charged the sale to have been made at that county; the court was held and the trial had there; and, as reported, the witness testified that he bought the ale "*of the defendant, at his place of business in North Madison, in said county.*" If there can be a doubt of what county and state were intended, it is beyond our comprehension. We are referred to the case of *Jackson* v. *The State*, 19 Ind. 312. There the defendant was indicted and tried in Grant county, in this State, for retailing intoxicating liquor, without license. The witness testified, "I bought a gill of sweet wine of the defendant for five cents, at Grant county, about the time charged in the indictment." The defendant was convicted, and it was held on appeal to this court, that the evidence did not show that the sale was made within the jurisdiction of the court.

The reason stated is, that "the evidence given would have as fully established the sale in any state where there is a Grant county as in this State."

There, as here, the question arose upon the sufficiency of the evidence to sustain the finding, and under the rule, as

rigidly adhered to then as now, that every reasonable intendment should be made in favor of the finding below, and that a judgment should only be reversed upon the question of the sufficiency of the evidence in cases of obvious error.

We think the ruling in that case was a clear departure from the rule just stated, and we cannot give it our approbation.

Here, the question as to the date of the sale is not so clear. The prosecuting witness testified that he purchased the ale of the defendant "during the week between Christmas and New-Year's." The year is not directly stated, but in view of the fact that the indictment was found and the trial had in January, 1870, it is but reasonable to infer that the witness referred to the week between the Christmas and New-Year's next preceding, and that he was so understood by the court. It was evidently the purpose of the witness, in making the statement, to fix the date of the sale, and with that intention, such a statement would scarcely have been made if any other Christmas and New-Year's had been intended by the witness. The conviction of the defendant involves the finding of the fact that the sale was made within the time limited by the statute, and we cannot say that the evidence did not sustain the finding.

Judgment affirmed, with costs.

J. L. Wilson and *E. R. Wilson*, for appellant.

D. E. Williamson, Attorney General, for the State.

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132 271

HIXON and Another *v.* CUPPY.

'STATUTE OF FRAUDS.—*Sale of Land.—Specific Performance.*—In a suit to foreclose a mortgage on real estate by the mortgagee against the mortgagor, the wife of the latter, on her application, became a defendant, and filed an

answer and cross complaint, averring, that when she married her co-defendant, she was entitled to the proceeds arising yearly from a certain sum of money during her life; that her said husband proposed that if she would sell said prospective income for a sum in hand and let him have said sum, he would let her have the lots described in said mortgage and would convey them to her with their improvements and would make additional improvements on them with said money, till they should be of a certain value; that she, to secure a home, in good faith, accepted said proposition, sold said yearly income at a sacrifice for a certain sum, and let her husband have a certain portion thereof on said agreement; that afterwards, her husband promised to make, and under her directions made, improvements on said real estate of certain value, by building thereon a house, he being enabled to do so from the money so obtained from her, no part of which had been repaid to her; that he had not made improvements on the property sufficient to make it worth the sum so given him by her, and it was worth not more than the amount he had so agreed to make it worth; that the house so built was in her possession during its erection, and was afterwards occupied by her and her said husband as a family residence, but was under her control and considered by them as being in her possession from its erection till the commencement of this suit, since which time she had rented it to other persons; that at various times her said husband had promised to convey the property to her, but neglected to do so; that long before the execution of said mortgage and before the creation of the debt secured thereby, the mortgagee had full notice of the equities of said wife.

Held, that the facts shown by the answer and cross complaint were sufficient to entitle the wife to specific performance.

APPEAL from the Sullivan Circuit Court.

GREGORY, C. J.—Suit by appellee against Reed Hixon on notes and mortgage executed January 19th, 1867. The appellant Margaret Hixon was, on her application, made a defendant, and filed her answer and cross complaint, averring, that, in 1863, she intermarried with the defendant Reed Hixon; that she was then entitled to, but had not the possession of, a large amount of money under the will of a former husband, in this, that she was to receive the proceeds arising from the sum of five thousand dollars, during her life; that after her marriage with Hixon, he being desirous of obtaining the possession of the money on the value of the prospective income, proposed that if she would sell the same for a sum in hand, and let him have it, he would let her have the lots described in the mortgage, and

would convey them to her with the improvements then thereon, of the probable value of one thousand dollars, and would vest of the money in making future improvements upon the lots, until they should be of the value of two thousand dollars; that she accepted the proposition in good faith, and sold said yearly income at a great sacrifice, viz., for the sum of twenty five hundred dollars, that she might thus be able to secure a home; that upon receiving the money she let her husband, Reed Hixon, have two thousand dollars thereof, and afterwards two hundred more, for the purpose and upon the agreement and understanding above; that Reed Hixon afterwards promised to and did make under her directions additional improvements by erecting a dwelling house upon the lots, of the value of six or seven hundred dollars, and was enabled so to do from the money so obtained from her; that the lots and improvements are worth not exceeding eighteen hundred or two thousand dollars; that no part of the money had been repaid to her by Reed Hixon, except about one hundred and fifty dollars in property, which she had suffered to be taken for his debts; that he did not make improvements on the property so as to make it worth as much as the money so by her given to him; that the house so built after the advancement of the money was in possession of said Margaret during its erection, and was by her and her husband after its completion occupied as and for a family residence, but that it was under her control and considered by them to be in her possession from that time until the commencement of this suit, and from thence hitherto she has rented it to other parties; that Reed Hixon at various times promised to convey to her the property, but neglected so to do; that the plaintiff, long before the execution of the mortgage and before the creation of the debt secured thereby, had full notice of the equities of the defendant Margaret Hixon.

A demurrer was sustained to this cross complaint, and that action of the court below is the alleged error assigned here.

When this case was here before (*Cuppy* v. *Hixon*, 29 Ind. 522), the facts then presented by the cross complaint were entirely different from the averments now under consideration. It was correctly said then in reference to the statute of frauds, that "the principle is, that only where there has been such part performance of the contract that the complete execution of it is necessary to prevent the perpetration of a moral and legal fraud, will equity apply the doctrine of estoppel and refuse to allow a party to consummate the fraud by availing himself of the statute."

There were then no facts averred to take the case out of the statute but the payment of the purchase-money. The facts now alleged, and admitted by the demurrer, bring the case within the rule. In addition to the payment of the purchase-money, the sacrifice of the yearly income, the exclusive possession of the property by the wife, and the erection of the dwelling-house with the money paid by her are shown.

In the absence of a written contract, the payment of the purchase-money, the possession under a verbal contract, and improvements on the property, have been repeatedly held by this court to be sufficient to take the case out of the statute of frauds.

It is claimed by the counsel of the appellee, that the cross complaint does not show a performance of the contract on the part of the wife. As we understand the facts averred, the husband failed to make the improvements contemplated by the original contract, but having received twenty-two hundred dollars, and having erected a dwelling-house of the value of only some seven hundred dollars, he promised to make the conveyance, thereby waiving the payment of the residue of the twenty-five hundred dollars. It is expressly averred that the husband did not make improvements on the property so as to make it worth as much as the money advanced by the wife.

The court erred in sustaining the demurrer to the cross complaint.

Judgment reversed, with costs. Cause remanded with directions to overrule the demurrer to the cross complaint, and for further proceedings.

J. M. Hanna, for appellants.

S. Coulson, for appellee.

LEONARD and Others *v.* SHIRTS.

GUARANTY.—*Notice.*—*Lease.*—It was stipulated in a lease for two years, that the lessee should pay the lessor rent, in a certain sum for the entire period, in two equal payments, for which the lessee agreed to give his notes, with surety to the satisfaction of the lessor. Certain third persons executed an agreement annexed to the lease, as follows: "We guarantee that" the lessee "shall perform his agreements in the foregoing contract." The lessee took possession, and failed to execute such notes or pay the sum due, of which notice was given to the guarantors ten months after the commencement of the lease.

Held, that the guarantors were not released from their liability as such as to the payment of the money, by the neglect of the lessor to notify them at an earlier date of the failure of the lessee to give the notes.

APPEAL from the Hamilton Circuit Court.

RAY, J.—Action by appellee upon a contract leasing to Leonard a farm for two years from March 1st, 1866, charging various breaches of the contract and joining the co-appellants, who executed this agreement: "We guarantee that John R. Leonard shall perform his agreements in the foregoing contract." One part of the original contract was, that Leonard should pay the appellee one thousand dollars for the two years rent, in two payments of five hundred dollars each, for which he was to give his notes with surety to the satisfaction of the appellee. A demurrer was overruled to the statement of the cause of action. The complaint alleges, that Leonard took possession and failed to execute such notes or pay the sum due, and that notice of this fact was given said guarantors on the 1st of January, 1867. It is insisted that

the neglect to notify the guarantors at an earlier date, of the failure of Leonard to give the notes, released them from liability. But it is plain that the principal thing intended by this contract was the payment of the money, and that the giving of the notes could be waived by the appellee, if the guarantors did not themselves see that the notes were executed and tendered. This duty rested upon them and was a matter for their own protection and security, and their neglect affords no defense against the liability which was incurred by them in guaranteeing that Leonard should pay the money. The same question is presented by answers, to which demurrers were properly sustained.

Judgment affirmed, with three per cent. damages and costs.

J. O'Brien and *J. W. Evans*, for appellants.

A. F. Shirts, for appellee.

Foltz *v.* The State.

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Criminal Law.—*Sabbath.*— *Desecration of.*—*Constitutional Law.*—That the "act for the protection of the Sabbath, and providing penalties for the desecration thereof" (2 G. & H. 481), is constitutional, must be regarded as settled.

Same.— *Indictment.*— *Evidence.*— *Variance.*—An indictment for desecrating the Sabbath charged, that the defendant "was found unlawfully at common labor and engaged in his usual avocation, to wit, then and there selling and delivering to William Dillon one cigar and receiving from him ten cents in payment therefor," &c.

Held, that the indictment alleged, substantially, that selling cigars was the defendant's usual avocation.

Held, also, that evidence that making and selling cigars was the defendant's business, was admissible.

Held, also, that proof that the sale charged was made to William *P.* Dillon, was not a material variance.

Same.—*Opinion of Witness.*—On the trial of an indictment for desecrating the Sabbath, a witness stated as his own opinion merely, that the defendant

was over fourteen years of age, and testified that the defendant was keeping house, living with a woman as his wife, whom the witness supposed to be the defendant's wife; that they lived together as husband and wife; and that the defendant had a mustache.

Held, that this evidence was sufficient to justify a finding that the defendant was at least fourteen years of age.

APPEAL from the Jefferson Criminal Circuit Court.

ELLIOTT, J.—The appellant was indicted under the act of 1855 (2 G. & H. 481), for desecrating the Sabbath, by being engaged on that day "in his usual avocation, to wit, then and there selling and delivering to William Dillon one cigar" for ten cents.

The indictment alleged the date, and averred that it was the first day of the week, commonly called Sunday, and contained proper averments negativing the fact that the transaction was within any of the exceptions contained in the act.

A motion to quash was interposed and overruled. A trial of the cause by the court, on a plea of not guilty, resulted in a conviction and judgment.

It is urged that the law under which the prosecution was had is obnoxious to the constitution of the State.

We decline the discussion of this question, for the reason that the act in question has been so long recognized and acted upon, and so often affirmed by this court, that it cannot longer be regarded as an open question in this State. See *Voglesong* v. *The State*, 9 Ind. 112.

The indictment is also objected to on the ground that it does not sufficiently allege that the sale of cigars was the appellant's "usual avocation." The language of the indictment is, that the appellant "was found unlawfully at common labor and engaged in his usual avocation, to wit, then and there selling and delivering to William Dillon one cigar and receiving from him ten cents in payment therefor." The language is not the most apt for a clear expression of the idea evidently intended by the draftsman; but the only reasonable and fair construction that can be given to it is, we think, that selling cigars was the appellant's usual avo-

cation, and that in the pursuit thereof he sold a cigar to Dillon on Sunday.

On the trial, Dillon, the prosecuting witness, was permitted to testify that the appellant's business was making and selling cigars, to which the appellant excepted. The evidence was clearly admissible.

There is nothing in the alleged variance between the name of "William Dillon," to whom the cigar is alleged, in the indictment, to have been sold, and the proof that his name was William P. Dillon. Had the facts been reversed, a more plausible objection would have been presented.

Another ground of objection to the finding is, that the evidence does not sufficiently prove that the appellant was fourteen years of age at the time of the sale. Dillon, on the original examination, testified that the appellant was over fourteen years of age. On cross examination he stated, "I do not know that the defendant is over fourteen years of age, of my own knowledge; don't know when he was born; have never heard him say; have never heard it talked about. It is only my opinion that he is." And then on his re-examination he said, "the defendant is keeping house, and lives with a woman as his wife, whom I suppose to be his wife. They live together as husband and wife. Defendant has a mustache."

This evidence is sufficient to justify the finding that the appellant was at least fourteen years of age.

We think the finding and judgment correct, from the evidence, and find no reason for a reversal of the judgment.

Judgment affirmed, with costs.

J. L. Wilson and *E. R. Wilson*, for appellant.

D. E. Williamson, Attorney General, for the State.

VIERLING *v.* THE STATE.

APPEAL.—*Recognizance.—Justice of the Peace.*—A defendant in a prosecution before a justice of the peace for retailing intoxicating liquor without a license was fined, and within the time allowed by law appealed to the court of common pleas. Instead of entering into a recognizance in the form prescribed by statute in such cases, he gave an appeal bond, conditioned as follows: "Now if the said" A. B. "shall prosecute his said appeal to effect and pay the judgment that shall be rendered against him on said appeal in said common pleas court then his bond shall be void." On motion of the prosecuting attorney, the case was stricken from the docket, over the defendant's objection.

Held, that said bond was a substantial compliance with the law, and that the court erred in striking the case from the docket.

APPEAL from the Gibson Common Pleas.

GREGORY, C. J.—Vierling was prosecuted before a justice of the peace, for retailing intoxicating liquors without a license. He was fined. Within the time allowed by law he appealed to the court below. Instead of entering into a recognizance in form, as required by the act prescribing the powers and duties of justices of the peace in State prosecutions (2 G. & H. 638, secs. 10, 11), he gave an appeal bond, conditioned as follows: "Now if the said Vierling shall prosecute his said appeal to effect, and pay the judgment that shall be rendered against him, on said appeal in said common pleas court, then this bond shall be void." The case was, on motion of the prosecuting attorney, stricken from the docket. The defendant excepted, and appeals to this court.

In favor of the action of the court below, it is claimed, that the appellant could only appeal from the judgment of the justice by entering into the recognizance required by the statute. On the other hand, it is urged, that the bond given was a substantial compliance with the law. The statute only requires that the recognizance shall be substantially in the form given. The form given is this: "We, A.

B.—— and C. D.——, severally acknowledge ourselves bound to the State of Indiana, in the sum of —— dollars each, if the said A. B.—— shall not appear at the first day of the next term of (here specify the court), to answer a charge of (here state the offense), at the county of —— and State of Indiana, and abide the judgment of such court."

All defects in form or substance in recognizances are cured by statute, and in actions on defective obligations of the kind, a suggestion in the complaint of such defect will entitle the plaintiff to recover to the same extent as if such recognizances were perfect in all respects. 2 G. & H. 333, sec. 790.

But notwithstanding this curative statute, it is the undoubted right of an appellee to insist on and have substantially such an obligation as the law requires.

We think the bond given in the case at bar was a substantial compliance with the law. Precisely the same appearance was necessary under the condition to "prosecute his said appeal to effect," as is required by the recognizance.

A criminal case cannot be tried in the absence of the defendant, unless in cases where the punishment is a simple fine; and then only on the conditions imposed by the statute, alike applying to cases where the defendant is under a recognizance and where he is not. 2 G. & H. 413 sec. 95. The condition of the bond, to "pay the judgment that shall be rendered against him," is substantially the same as that of the recognizance to "abide the judgment of such court."

The bond in question is substantially a recognizance.

A recognizance at common law is defined to be "an obligation of record, entered into before a court or officer duly authorized for that purpose, with a condition to do some act required by law, which is therein specified." 2 Bouvier's Law Dic. 423.

The court below erred in striking the case from the docket.

Judgment reversed; cause remanded, with directions to

overrule the motion to strike the case from the docket, and for further proceedings.

A. C. Donald and *C. A. Buskirk*, for appellant.

D. E. Williamson, Attorney General, *M. W. Pearse*, and *W. M. Land*, for the State.

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Hord, Prosecuting Attorney, on the Relation of Stanley and Others, *v.* Elliott and Others.

Turnpike.—*County Commissioners.*—*Jurisdiction.*—*Information.*—Where at any time before final action of the board of county commissioners upon a petition to organize a turnpike company under the act of 1865, a number of the petitioners, sufficient to reduce the quantity of land represented by the remaining petitioners to less than three-fifths of all the lands within three-fourths of a mile of the proposed road, file a written withdrawal of their names from the petition, and the commissioners, disregarding such withdrawal, entertain jurisdiction and grant permission to organize the company, an information will lie to impeach the legal corporate existence of the company organized under such authority.

APPEAL from the Fayette Circuit Court.

Elliott, J.—The principal question presented in the case is raised by the decision of the circuit court in sustaining the motion of the appellees to strike from the complaint, or information, the first, second, third, fourth, fifth, sixth, and seventh specifications, or grounds, upon which the information was based.

The object of the information was to test the legal corporate existence of the Alquina and Springersville Turnpike Company, an association claiming to be legally organized as a corporation, under the act of 1865, to allow county commissioners to organize turnpike companies, &c. The information shows that, at the time the petition was presented by the appellees to the board of county commissioners, asking a permit to organize said turnpike company, it

contained the names of Samuel Brown, John Newland, Lydia Swisher, Thomas N. Jackson, John Walker, and George P. Lyons, who were the owners of six hundred and twenty-seven acres of land within three-fourths of a mile of the proposed road, and that the other petitioners did not own three-fifths of all the land lying within three-fourths of a mile thereof; that during the pendency of the petition, and before the same had been finally acted upon or disposed of, said Brown, Newland, Swisher, Jackson, Walker, and Lyons, filed in said commissioners' court a written withdrawal of their names from said petition, objected to being longer considered as petitioners, and asked that their names might be stricken from the petition. But the commissioners denied the request, disregarded the written withdrawal of the names of said parties, and held them as petitioners, in determining that the petitioners were the owners of three-fifths of all the lands within three-fourths of a mile on each side of the proposed road. These facts are relied on as reasons why said company had no legal existence as a corporation, in the second and third specifications of the complaint. It is conceded that the commissioners have no jurisdiction or power to authorize the organization of a corporation under the act, except upon the petition of persons representing three-fifths of all the lands within three-fourths of a mile of the proposed road. But it is argued, in support of the action of the circuit court, that although the existence of this fact is essential to the jurisdiction of the commissioners over the subject, and notwithstanding the commissioners' court is an inferior court of limited jurisdiction, still, as the record shows affirmatively that it appeared to their satisfaction that the petitioners did represent more than three-fifths of all the lands within the designated limits, the finding of that fact by the commissioners is conclusive upon the parties in this case. It may be regarded as settled, that when the jurisdiction depends upon a fact to be passed upon by the court, and jurisdiction has been exercised, the record being silent as to the fact, if

the court is one of superior jurisdiction, the legal presumption is that the existence of the fact upon which the jurisdiction depends has been found by the court; and this presumption is conclusive in a collateral proceeding. *Dequindre* v. *Williams*, 31 Ind. 444. But if the court is one of inferior and limited jurisdiction, the record of its proceedings must affirmatively show the existence of all the facts upon which the jurisdiction depends, or the proceeding is a nullity. But when the existence of the jurisdictional facts do so appear, the record is conclusive against collateral attacks. Whether the information in this case is to be regarded as a direct proceeding to impeach the authority granted by the board of commissioners for the formation of the company as a corporation, or only as a collateral proceeding, we need not determine, for the reason that it is not necessarily involved in the case. The error complained of in the proceedings of the commissioners is not an error of fact, but of law. It is not that they erred in finding that the persons whose names were to the petition, when filed, represented more than three-fifths of all the lands within three-fourths of a mile of the proposed road, for such was the certificate of the county auditor; but the complaint is, that the commissioners erroneously entertained jurisdiction of the petition and granted the permit for the organization of the company, after the appellants had filed a written withdrawal of their names from the petition, and thereby reduced the quantity of land represented by the remaining petitioners to less than three-fifths of the lands within three-fourths of a mile of the proposed road.

There can be no question of the right of the appellants to dismiss the petition, as to themselves, or to withdraw their names from it, at any time before the final action upon it by the board. The written withdrawal of their names was, in effect, a dismissal of the petition as to them. It was an error of law in the commissioners to deny the appellants' right to so withdraw, and to regard them as petitioners afterwards.

It is stated in the second and third specifications of the information, stricken out by the court, that the remaining petitioners did not represent three-fifths of the lands within three-fourths of a mile of the proposed road; indeed, the record of the board of commissioners, which is made a part of the information, shows that the appellants offered to prove that fact, but the evidence was refused, on the ground that the appellants could not withdraw, as petitioners, after the petition was filed. It was by this error of law that the commissioners maintained jurisdiction and granted the authority for the organization of the company, and not an error as to the existence of a jurisdictional fact.

The proposition, that jurisdiction wrongfully assumed upon a misapprehension or misconstruction of the law cannot be maintained, is too clear for argument.

We think the court erred in striking out the second and third specifications of the information; and for that error the judgment must be reversed.

Judgment reversed, with costs, and the cause remanded, with directions to the court below to overrule the motion to strike out the second and third specifications of the information, and for further proceedings.

B. F. Claypool, for appellants.

J. C. McIntosh, for appellees.

Black *v.* The Enterprise Insurance Company.

Parties.— *Promissory Note.—Agent.*— A promissory note payable to A. B., "agent of the Enterprise Insurance Company," was executed for the use of said company in consideration of a policy of insurance underwritten by it.

Held, in a suit on the note in the name of said company, that the action was brought by the proper party.

Foreign Insurance Company.—An answer to a suit by an insurance company on a promissory note executed to such company in consideration of a policy

of insurance issued by it, alleging that the plaintiff is a foreign insurance company, and that the contract of insurance was entered into in this State through an agent resident therein, but not also showing a non-compliance with the requirements of the act of December 21st, 1865, regulating foreign insurance companies, &c., is bad on demurrer.

APPEAL from the Switzerland Common Pleas.

GREGORY, C. J.—Suit on a promissory note payable to "Frederick J. Waldo, agent of the Enterprise Insurance Company." The complaint avers, that the consideration of the note was a policy of insurance underwritten by the appellee on a flat boat and cargo of hay of the defendant, from Vevay, Indiana, to New Orleans, Louisiana, and that the note was executed for the use of the plaintiff.

A demurrer was overruled to the complaint; and this is assigned for error.

The code provides, that "every action must be prosecuted in the name of the real party in interest." This is the rule in equity as it stood before the code. The complaint shows that the appellee is the real party in interest.

The defendant, Black, the appellant, answered in four paragraphs; the third of which is the denial. A demurrer was overruled as to the first and second, and sustained as to the fourth. The sustaining of this demurrer presents the next question in the case.

The first paragraph, upon which issue was taken by the denial, sets up, that the plaintiff is a foreign insurance company, organized under the laws of Ohio; that the contract of insurance was made in Indiana, through an agent resident therein; that prior to the execution of the policy, the company and the agent had failed to comply with the requirements of the act of December 21st, 1865, regulating foreign insurance companies and their agents.

The fourth, to which the demurrer was sustained, omits the allegation of non-compliance with the statute, averring the other facts contained in the first.

The note on its face imports a valid consideration. It is incumbent on the appellant, before he can avoid his liabili-

ty thereon, to aver and prove its invalidity. It is not enough to show that the plaintiff is a foreign insurance company, and that the contract of insurance was entered into in this State, through an agent resident therein, but he must go a step further and show a non-compliance with the statute.

The court below committed no error in sustaining the demurrer.

This disposes of the only remaining question in the case. The court committed no error in overruling the motion for a new trial. The burden of the issue being on the defendant, it was necessary for him to prove the allegation in the answer, of non-compliance with the statute. But he failed to introduce any evidence whatever.

The plaintiff introduced in evidence the note sued on, and the certificate of the Auditor of State showing a substantial compliance with the statute.

Judgment affirmed, with costs, and ten per cent. damages.

S. Carter and *W. R. Johnston*, for appellant.

J. B. McCrellis, for appellee.

Garnier *v.* Gebhard and Another.

Contract.—*Construction of.*—*Partnership.*—One of two partners in the business of brewers executed an agreement for the sale of "his whole interest in the brewery at," &c., "consisting of stock on hand, personal property, real estate, &c., &c.." describing certain town lots, "for the sum of," &c.

Held, that said agreement, taken according to its terms, did not dispose of moneys on hand or on deposit belonging to the partnership, or of bills receivable or accounts in favor of the firm.

APPEAL from the Dearborn Circuit Court.

Suit by the appellant, Garnier, against the appellees, Gebhard and Hauck, for the settlement of the affairs of a

copartnership theretofore existing between said Garnier and Gebhard and the appointment of a receiver.

The complaint sets up the formation of the partnership in the brewing business and the time of its continuance and alleges, that on the 14th of March, 1866, the appellant and the appellees entered into an agreement in writing, as follows: "This certifies that John B. Garnier has this day bargained and sold to J. J. Hauck, Jr., of Rush county, Indiana, and Julius Gebhard, of Lawrenceburgh, Indiana, his whole interest in the brewery at New Lawrenceburgh, Indiana, consisting of stock on hand, personal property, real estate, &c., &c. (lots Nos. 5, 6, 7, 8, and 9), for the sum of thirty-four thousand dollars, ten thousand dollars cash in hand," the remainder in instalments, "with six per cent. interest from date of purchase, with approved security on nine thousand dollars, balance secured by mortgage."

It was alleged, that afterwards, on the 21st of March, 1866, the plaintiff with his wife, pursuant to said agreement, upon the cash payment made in accordance therewith and upon the performance of the other conditions, made and delivered a deed of conveyance and instrument of transfer to the appellees, which is set out, and in which the property conveyed and transferred is described as in said agreement.

The complaint further alleged, that at the time of making the contract recited, there were outstanding and due said partnership from divers persons sundry claims and debts evidenced by instruments in writing, such as drafts, checks, bills of exchange, and promissory notes, and on book accounts, amounting in the aggregate to the probable sum of fifteen thousand dollars; that there was then money on hand, deposited in a safe belonging to the plaintiff and standing in said brewery, for the use of said partnership, the sum of three hundred dollars, the property of said partnership in said business of brewing in said brewery; that there was then money on hand deposited in the First National Bank of Lawrenceburgh, the sum of one thousand dollars, the property of said partnership in said business;

that by the terms of said contract and deed, said claims and money were not bargained and sold or conveyed by the plaintiff to the defendants, but remained undisposed of and the property of said partnership; that there were then outstanding against said partnership and in favor of different persons, sundry claims and debts evidenced by promissory notes and other instruments in writing, and owing and due on book accounts, amounting to the probable sum of eight thousand dollars, which remains unpaid; that by said sale and conveyance said partnership was dissolved, and it was then the object and intention of the partners to wind up all their partnership concerns; that immediately after the execution and delivery of said deed, the defendants took exclusive possession of the books of said partnership between the plaintiff and Gebhard, and have hitherto prevented the plaintiff from having any access thereto, and have taken exclusive possession of said money in said safe, and have converted the same to their own use, and have drawn said money deposited in said bank and converted it to their own use; and he is informed and believes that they have collected and receipted for, in the name of said firm of Garnier & Gebhard by the defendant Gebhard, divers amounts of money from various persons, on said claims, debts, and demands outstanding in favor of said partnership, and have converted them to their own use; that between the time of making said contract and the time of the delivery of said deed, said Gebhard collected and receipted for, in the name of said firm of Garnier & Gebhard, divers sums of money from various persons on said debts outstanding in favor of said partnership, and has converted such sums of money to the sole use and benefit of the defendants; that said Gebhard severally, and jointly with defendant Hauck, is proceeding to collect and receipt for such debts and to apply the sums of money thus received to the sole use of defendants; that the defendants, both and each, have hitherto failed and refused to pay the plaintiff his share of said money on hand and deposited in said safe, or of that deposited

in said bank, or of said sums of money collected; that he is informed and believes that said Gebhard, individually and in the name of Garnier & Gebhard, and the defendants jointly have given notice to the persons owing said debts to said partnership that the plaintiff bargained and sold said debts to the defendants, that they alone are authorized to collect and receipt for and settle said debts, and that the plaintiff has no right or authority to interfere with, collect, receipt for, or settle the same or any or either of them. Prayer, that said partnership between the plaintiff and defendant Gebhard be taken as dissolved and be dissolved; that the defendants jointly and severally be enjoined from further interfering with any of the remaining property and concerns of said partnership; that a receiver be appointed, &c.

The defendants answered in four paragraphs, the second of which only need be noticed here. It admits the making of said contract on the 14th of March, 1866, and alleges, in substance, that thereby the plaintiff bargained and sold to the defendants all his right and interest in said brewery, consisting of and embracing said lots 5, 6, 7, 8, and 9, and the buildings thereon, and all the fixtures and machinery attached and connected therewith, and all the personal property employed in and about said building, and stock on hand, consisting of beer-bottles, casks, beer-wagons, horses, harness, hops, buggy and harness, malt, safe in office, money on hand in the safe and deposited in bank, bills receivable, accounts, books, and all demands due and owing to said firm of Garnier & Gebhard, which is the same property set forth in the complaint; that after said agreement had been executed and delivered, the plaintiff pursuant thereto delivered over to the defendants said brewery, with all the fixtures and machinery used in carrying on said business, and all the beer on hand, casks, bottles, beer-wagons, horse and buggy and harness, malt, and the books and accounts, the safe in the office, the money on hand and on deposit, all the bills receivable, except the amount of about five thousand dollars, which the plaintiff had taken from

the office of said firm for the purpose of collecting, but which he then agreed and promised to return to the defendants; that on the 21st of March, 1866, in pursuance of said agreement, plaintiff executed and delivered to defendants said deed, and the defendants paid the plaintiff ten thousand dollars, gave their notes with approved security for nine thousand dollars, and secured the balance of the purchase-money by a mortgage, of which a copy is set out; that the plaintiff made no pretense of having claim or right to certain malt in a house rented by said firm apart from said brewery, or any of the notes, books, bills receivable, or any of the personal property, buggy, or harness, or of any money on hand or on deposit, until after the payment of said ten thousand dollars and the delivery of the notes and securities for the balance of the purchase-money as before stated. Wherefore, the defendants say that they are the owners of said bills, notes, accounts, money, buggy and harness, and malt, and have been the owners thereof since March 14th, 1866. Prayer, that the plaintiff be enjoined from intermeddling in any way with the same, or disturbing the defendants in their possession thereof; that their title thereto be quieted; and for costs.

A demurrer to this paragraph was overruled, and the appellant excepted.

The plaintiff replied to the second paragraph of the answer, that he never delivered or agreed to deliver to the defendants or either of them said money on hand in said safe, or said money on deposit in bank, or said books, accounts, notes, bills receivable, rights, credits, or effects, or any or either of them as in said answer alleged, or otherwise; that although these were partnership property, growing out of the business carried on by said Garnier & Gebhard in said brewery, and remained undivided between them before the time of making said contract, yet by the terms of said contract they were not to pass and did not pass to the defendants; nor were they or either of them stock on hand or personal property belonging or appertaining to said brew-

ery and bargained and sold or intended to be bargained and sold by the plaintiff to the defendants under said coutract; but under said contract they and each of them remain the joint property of plaintiff and defendant Gebhard as partners as in the complaint set forth; and that the plaintiff now brings into court the moneys, property, bills receivable, and all things in his hands as such partner, to be turned over to a receiver to be appointed herein, &c.

To this reply the court sustained a demurrer, and the appellant excepted.

RAY, J.—The agreement, as stated in the complaint, is for the sale by John B. Garnier of "his whole interest," not in the partnership, but "in the brewery at New Lawrenceburgh, Indiana, consisting of stock on hand, personal property, real estate, &c., &c. (lots Nos. 5, 6, 7, 8, and 9,), for the sum of thirty-four thousand dollars." There is no averment of any mistake or error in drafting the instrument, and therefore we must be controlled by its plain language. This sale of the appellant's interest in the brewery included certain real estate connected with the building occupied as a brewery, the stock on hand, and the personal property used in the manufacture, storing, and disposal of the products of the brewery. Beyond this it is impossible by construction to carry this agreement. It does not purport to dispose of the moneys on hand or on deposit belonging to the partnership, or of the bills receivable, or accounts in favor of the firm; nor do the purchasers assume to pay from the assets the debts owing by the partnership.

The second paragraph of the answer avers, that after the execution of the agreement, the appellant delivered over to the appellees the moneys, bills receivable, &c., belonging to the firm. This averment presents not a question of law, but one of fact. The appellant had the power to make a gift of the property or of his interest therein and his right of possession thereof. The demurrer to this paragraph was therefore properly overruled.

The reply to this paragraph of the answer denies the delivery of any of the choses in action or personal property, and proceeds to reassert the claim as stated in the complaint. The demurrer to this reply presented the question which had been already tendered in the complaint, and the construction we have placed upon the contract sustains the reply. This demurrer should have been overruled.

Judgment reversed, and cause remanded, with directions to overrule the demurrer to the reply to the second paragraph of the answer. Costs here for appellant.

W. S. Holman and *J. Schwartz*, for appellant.

Waddle *v.* Harbeck.

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Pleading.—*Parties.*—*Set-Off.*—*Promissory Note.*—Suit on a note by the payee against the maker. Answer, that the note was given in consideration of the sale of a certain number of sheep purchased by the defendant of a third person named, and for no other consideration; that it was made payable to the plaintiff at the request of said third person, who *represented* that he desired it made payable to the plaintiff for the purpose of enabling him to place it in the plaintiff's hands as his agent for collection, and for no other purpose; that at the time the note was given, said third person was indebted to the defendant in a certain sum, of which a bill of particulars was annexed; and the defendant offered to set off said indebtedness against the note.

Held, that the answer was bad, for the reason that it did not allege that the plaintiff was not the owner of the note in his own right, or that said third person had any right thereto or beneficial interest therein.

Same.—*Trustee.*—*Suit by.*—In a suit by a trustee, the defendant may set off a debt due him from the *cestui que trust.*

Same.—Suit on a note by the payee against the maker. Answer, by way of set-off, that the plaintiff was not the owner of the note and had no interest in it, but was merely the agent of a third person named, who procured the note to be made payable to the plaintiff, to enable the latter to collect it as such agent, and for no other reason; that the note was given for certain articles sold to the defendant by said third person; that at its date said third person was indebted and still continued to be indebted to defendant for goods sold and delivered by the latter to the former, of which a bill of particu-

lars was filed, amounting to a certain sum, less than the amount of the note; that, by agreement of the parties, said note was made payable to the plaintiff for the purpose of enabling him to settle the same and receive from the defendant the excess over the amount of said indebtedness, which it was agreed, when the note was made and delivered, should be applied in part payment of the note.

Held, that the answer, if true, made the plaintiff a trustee of an express trust, under the statute, and capable of maintaining the action in his own name.

Held, also, that the answer was good on demurrer.

APPEAL from the Porter Common Pleas.

ELLIOTT, J.—Suit by Anna Harbeck against Waddle, the appellant, on a promissory note executed by the latter to the former, on the 11th of December, 1867, for three hundred and forty dollars, payable twelve months after date, with interest at the rate of ten per cent.

The appellant filed an answer consisting of seven paragraphs. The first was a denial of the cause of action. The others were special defenses, to which a demurrer was sustained by the court, and the appellant excepted.

The cause was tried by the court, a jury being waived. Finding and judgment for the plaintiff for the amount of the note and interest.

The ruling of the court on the demurrer to the second, third, fourth, fifth, sixth, and seventh paragraphs of the answer, presents the only questions made in this court.

The second paragraph alleges, that the note sued on was given in consideration of the sale of one hundred and fifty sheep purchased by the appellant of one Carson Harbeck, and for no other consideration whatever, that it was made payable to the plaintiff at the request of said Carson Harbeck, who represented that he desired it made payable to the plaintiff for the purpose merely of enabling him to place it in her hands as his agent for collection, and for no other purpose; that at the time the note was given, said Carson Harbeck was indebted to the appellant in a large sum, to wit, five hundred dollars, a bill of particulars of which is made a part of the paragraph. It also contains an

offer to set off so much of said indebtedness as is necessary to pay the note.

The paragraph is bad, for the reason that it does not allege that the plaintiff is not the owner of the note in her own right, or that Carson Harbeck has any right thereto, or beneficial interest therein. If Carson Harbeck was indebted to the plaintiff, and had the note made payable to her in satisfaction of such indebtedness, she would be the *bona fide* holder of it in her own right, and the appellant could not set off against it any indebtedness held by him against Carson Harbeck. If the plaintiff was not the beneficial owner of the note, but held it merely in trust or as the agent of Carson Harbeck, those facts should be clearly averred. The averment in the paragraph, that Carson Harbeck represented that he desired the note made payable to the plaintiff to enable her to collect it as his agent, is not sufficient.

It is alleged in the third paragraph, that the plaintiff is not the owner of the note, nor has she any interest in it; that she is merely the agent of Carson Harbeck, who procured the note to be made payable to her to enable her to collect it as his agent, and for no other reason; that the note was given for two hundred sheep, sold to the appellant by said Carson Harbeck; that at the date of the note said Carson was and still is indebted to the defendant for goods and chattels sold and delivered by him to said Carson, a bill of particulars of which is filed herewith; that said note, by agreement of the parties, was made payable to said plaintiff for the purpose of enabling her to settle the same, and receive from the defendant the excess over and above the amount which the said Carson then owed and still owes the defendant (the amount claimed by the bill of particulars being two hundred and fifty-eight dollars and sixty-nine cents); "and it was agreed at the date of said note and when the same was delivered that said indebtedness should be applied in part payment thereof;" wherefore, he offers to set off said indebtedness against said note.

This paragraph alleges with sufficient certainty that the

note was made payable to the plaintiff in trust and for the use and benefit of Carson Harbeck, and that the plaintiff had no beneficial interest in it. It is not an answer in abatement, but is pleaded as a set-off. Its averments, if true, make the plaintiff, under the statute, the trustee of an express trust, and as such she is authorized to maintain the action in her own name. 2 G. & H. 37, sec. 4. The material question arising upon the paragraph is, whether, in a suit brought by a trustee, the defendant may set off a debt due him from the *cestui que trust*. The authorities on the question are not uniform, but the better opinion seems to be that the set-off in such a case may be made. See 2 Parsons on Con. 250, 251, and notes. The revision of 1843, contained a provision expressly authorizing a set-off in such cases, against the beneficiary. Code of 1843, p. 709. Our present code does not contain such a provision, but the provision in the statute of 1843 was enacted under the common law rule requiring all actions at law to be brought in the name of the party holding the legal right. The practice is different under the present code, which, as a general rule, requires all actions to be prosecuted in the name of the real party in interest. The fourth section, referred to above, enumerates certain exceptions to the rule, amongst which is a trustee of an express trust, who is authorized to sue in his own name without joining with him the person for whose benefit the action is prosecuted. The present practice is substantially the same as the chancery practice, and regards the substantial rights and equities of the parties, rather than technical rules and forms. Here, if the facts alleged in the paragraph be true, Carson Harbeck, being the real party in interest, might maintain an action on the note in his own name, and in such a suit there would be no question of the appellant's right of set-off. In a suit by a trustee who sues for the use or benefit of another, a debt due the defendant by the trustee personally cannot be set off. *Flournoy* v. *The City of Jeffersonville*, 17 Ind. 169. The reason is, that the trustee has no beneficial interest in the

cause of action. The reason for excluding the set-off against the trustee would make it admissible when the debt is due from the beneficiary, "the real party in interest." The right of set-off in such a case is clearly recognized in *Jones* v. *Hawkins*, 17 Ind. 550.

We think the paragraph was good, and the demurrer to it should have been overruled.

The fourth paragraph sets up an agreement between the appellant and Carson Harbeck, made at the execution of the note, that the amount of the alleged indebtedness of said Carson to the appellant should be allowed against so much of the note in the final settlement thereof. The paragraph is bad for the same reason as the second, if for no other.

The fifth paragraph simply alleges that the plaintiff has no interest in the suit, and that the assignment of the note to her by Carson Harbeck was without any consideration whatever. It is too radically defective as an answer to justify comment.

The sufficiency of the sixth paragraph is not urged by the appellant, and we need not notice it in this opinion.

The seventh paragraph alleges, that the note mentioned in the complaint was delivered to Carson Harbeck, and was executed in consideration of the sale and delivery to the appellant by said Carson, of one hundred and fifty sheep, at two dollars per head, and some hay and fodder, amounting to forty dollars, and for no other consideration; that when the note was given it was intended to be a final settlement of all unsettled matters between them, except a team of horses and four head of cattle, before that sold and delivered by the appellant to said Carson, at the sum of three hundred and seventy dollars; "that there was a mistake in said settlement, in this, that the settlement was based on the supposition that the mutual accounts theretofore existing between said Carson and the defendant were about even, except the value of the team of horses and four cattle, when, in fact, said Carson was then largely indebted to the defendant, as appears by reference to a bill of partic-

ulars filed herewith; that if he had known of said mistake at the time, he would not have executed the note; that there would in fact have been nothing due said Carson;" that the note was delivered by said Carson to the plaintiff before the appellant was aware of said mistake; that said Carson so delivered the note to the plaintiff to cheat and defraud the appellant, and then fled the jurisdiction of the court, leaving no property in the State subject to execution. Prayer, that the mistake be corrected, and that "the same be deducted and set off against said note," &c.

It is somewhat difficult to determine the character of the defense designed by the pleader to be set up in this paragraph. It certainly cannot be sustained as a set-off. It does not contain the proper averments of an indebtedness by Carson Harbeck to the appellant, for that purpose. Besides, it fails to show that said Carson had any interest whatever in the note sued on. It is equally defective as a plea of failure of the consideration, in whole or in part; for it expressly alleges that the note was given in consideration of sheep, hay and fodder, sold and delivered by said Carson to the appellant, the value of which was just equal to the amount of the note, and for no other consideration whatever; thus excluding the idea that it was given for the balance found due upon a settlement of the mutual accounts between the parties in which there was a material mistake made against the appellant, as alleged. And it will be observed that it is not averred that such a mistake was made either by an error in the calculations or by the omission of certain items of account due the appellant. It is true, that after the averment that the note was given for the sheep, hay, and fodder, and for no other consideration whatever, it is alleged that when the note was given, it was intended to be a final settlement of all accounts between the parties, except certain horses and cattle, and that such settlement was based on the supposition that their other mutual accounts were about even, but that in truth said Carson was largely indebted to the appellant on a proper

settlement of such accounts; but this does not affect the admitted consideration of the note.

Indeed, if the parties, without an examination and casting up of their mutual accounts, to ascertain just how they stood, or in whose favor the balance might fall, mutually agreed, as a basis of settlement, that they should be considered as equal, and made the settlement accordingly, it is not perceived why such settlement would not be binding. But if otherwise, it must be because such an agreement did not amount to a valid settlement, which would still leave the note supported by the consideration admitted in the paragraph.

The paragraph, in any view that can be taken of it, is clearly bad, and the demurrer to it was properly sustained.

The judgment is reversed, with costs, for the error of the court in sustaining the demurrer to the third paragraph of the answer, and the cause remanded with directions to the court below to overrule the demurrer to that paragraph, and for further proceedings.

T. J. Merrifield and *W. H. Calkins*, for appellant.

S. I. Anthony, *F. Church*, *S. E. Perkins*, *O. F. Baker*, and *S. E. Perkins, Jr.*, for appellee.

Watts *v.* The State.

Criminal Court.—*Appointment of Judge.*—On the trial of an indictment in a criminal circuit court, the judge of that court having been of counsel in the cause, the judge of the court of common pleas presided, his appointment being shown only by the record made *after* he took the bench.

Held, that the defendant could not, in the Supreme Court for the first time, raise the question of the power of the judge who presided, no want of power being shown by the record.

Instruction to Jury.—An instruction to the jury on the trial of a criminal action, by which the defendant was not injured, cannot be urged by him as error on appeal.

APPEAL from the Vanderburgh Criminal Court.

GREGORY, C. J.—The appellant was indicted in the court below, for murder in the first degree. He pleaded "not guilty." A jury trial resulted in a verdict of guilty of murder in the second degree. The court overruled a motion for a new trial, and sentenced the defendant to imprisonment for life.

The first question made in this court is, that the judge before whom the case was tried had no jurisdiction. Hon. Andrew L. Robinson was the regular judge. He had been of counsel in the cause. Hon. Morris S. Johnson, judge of the court of common pleas, presided at the trial. The record made *after* Judge Johnson took the bench shows that he was called to try the case by Judge Robinson. It is urged that the record ought to show the appointment of Judge Johnson *before* he assumed to act. There was no objection raised to the judge at the trial. The question is attempted to be raised here for the first time.

It was in the power of Judge Robinson, under the circumstances stated above, to appoint a judge of any court of record to try the cause. 2 G. & H. 9, section 2.

The record does not disclose the want of authority in Judge Johnson. If it is admitted that it was not competent for him to make a record showing his authority, then it would follow that the record is silent on the subject.

In *Feaster* v. *Woodfill*, 23 Ind. 493, it is said, "The statute provides what shall be deemed parts of the record, and what the clerk shall certify in cases appealed to this court. 2 G. & H. 273, sec. 559. The special appointment of a judge is not required to be certified, and in the absence of all objection, this court will presume that the appointment was properly and regulary made." *Barnes* v. *The State*, 28 Ind. 82, does not overrule *Feaster* v. *Woodfill*, *supra*, although it is difficult to give a legal reason for the apparent conflict in the principle ruled.

It is trifling with the administration of justice, to say that in cases of changes of venue from one judge to another in

the same court, the record must show the appointment of the judge before whom the case is set down for trial, and that in cases of the absence of the judge and an appointment under the law of some other judge, the record may be silent. The only principle that these cases of either class can stand on is that ruled in *Feastcr* v. *Woodfill*, *supra*.

In *Barnes* v. *The State*, *supra*, the record did show the appointment, by which it appeared that the attorney selected by the judge to try the case was not clothed with the power of judge; the mutual agreement of the litigants was wanting. If the record did so show, by a bill of exceptions, in the overruling of an objection made by the defendant, then the ruling is clearly right.

A majority of the judges hold that it is too late to raise the objection to the power of Judge Johnson in this court for the first time, no want of power being shown by the record.

One of the causes assigned in support of the motion for a new trial was the misdirection of the court in its charge to the jury. The court charged, that "murder in the first degree and murder in the second degree differ only in this, that if the unlawful intention to kill did not exist in the mind before the fatal act was committed, then, although the killing appears to have been done purposely, and the evidence does not rebut or obviate the legal presumption of malice, yet unless it appears from the evidence that the unlawful intention to kill did exist in the mind of the defendant before he committed the fatal act, you would only in that case, find the defendant guilty of murder in the second degree."

This was a very lame attempt to draw the distinction between murder in the first degree and murder in the second degree. The record does not show what other instructions were given, nor that this was the only instruction. In the absence of such showing it is fair to presume that the jury were properly instructed as to the difference between mur-

der and manslaughter. The instruction did not harm the appellant, for the reason that the jury only found him guilty of murder in the second degree.

Three other grounds for the new trial are insisted upon; first, newly discovered evidence; second, surprise; third, that the evidence does not support the verdict. The bill of exceptions fails to set out any affidavit in support of the motion for a new trial. The affidavit of one Sarah Boyd and the examination before the coroner's jury are appended to the transcript of the record as exhibits; but they are not even certified by the clerk of the court below. The record fails to show any newly discovered evidence or surprise.

We have examined the evidence given on the trial, and while we feel that it is not strong, yet under the rule on this subject, it does not justify us in interfering with the finding of the jury.

Judgment affirmed, with costs.

W. P. Hargrave and *C. Denby*, for appellant.

D. E. Williamson, Attorney General, for the State.

PATTISON *v.* CULTON and Others.

STOPPAGE IN TRANSITU.—A. shipped from Chicago a quantity of wheat, consigned, according to bill of lading in duplicate taken by him, to B., at Indianapolis, *on account of A.*, who had contracted it to B., but it was not to be his till paid for. A. drew at sight, on the date of the shipment, for the price of the wheat, attaching to the draft one copy of the bill of lading endorsed, and negotiated the draft at a Chicago bank, which transmitted it to an Indianapolis bank for collection. During the forenoon of the day after the shipment, while the wheat was in transit, C. purchased the wheat of B., at Indianapolis, and paid for it, taking from him at the time a bill of lading for the wheat, issued by a railroad company at Indianapolis, on that day, to B., on account of C., who supposed the wheat had then arrived at Indianpolis. The shipping list had been received, but the wheat did not arrive till the night of the following day. C. had no notice of any right of A. to the

wheat. Said draft reached Indianapolis at about the hour that B. sold the wheat to C. An attempt was immediately made to present the draft, but B., the drawee, who was insolvent and failed that day, could not be found. In the afternoon, the Indianapolis bank notified the carrier, said railroad company, to hold the wheat for the consignor; and at a later hour on the same day, a similar notice was given at the express instance of said consignor; and the wheat was held accordingly.

Held, in an action of replevin by C., that he had no right to the possession of the wheat.

APPEAL from the Marion Civil Circuit Court.

This was an action of replevin brought by the appellant against the appellees, for certain wheat, then in cars at Indianapolis.

Issues were formed, which were tried by the court. Finding and judgment for the defendants, for the return of the wheat or the payment of the value, which was assessed at twelve hundred and ninety-two dollars, and for one hundred and three dollars damages for the detention thereof. A motion for a new trial was overruled, and the appellant excepted.

The wheat was taken on the writ and delivered to the appellant on the 30th of August, and the finding and judgment were rendered on the 4th of January following. The evidence tended to prove that the wheat weighed forty-seven thousand pounds, and was worth, according to some of the witnesses, one dollar and seventy-five cents per bushel, according to others, one dollar and sixty-five cents per bushel.

FRAZER, J.—We are of opinion that the damages assessed were not excessive.

The case made by the evidence, viewed in the most favorable light to sustain the verdict, as it is our duty to view it, was this: During the forenoon of August 29th, 1867, the plaintiff, Pattison, purchased, at Indianapolis, from H. W. Comstock & Co., forty-seven thousand pounds of wheat and paid for it, taking at the time from them a bill of lading for the property issued by the Indianapolis, Cincinnati

and Lafayette R. R. Co. at Indianapolis, on that day, to H. W. Comstock & Co., on account of Pattison. The wheat was at the time in transit from Chicago to Indianapolis, arriving the night of the 30th, though Pattison supposed it had arrived, and, indeed, the shipping list had been received. He had no notice of any right of the defendants to the wheat. The wheat had been shipped from Chicago by the defendants on the 28th, consigned, according to the bill of lading in duplicate taken by them, to H. W. Comstock & Co., at Indianapolis, *on account of the defendants*. The wheat was contracted by the defendants to H. W. Comstock & Co., but was not to be theirs till paid for. The defendants drew at sight on H. W. Comstock & Co. for the price of the wheat, under date of the 28th, attaching to the draft one copy of the bill of lading endorsed, and negotiated the draft at a Chicago bank, which transmitted it to an Indianapolis bank for collection. The draft reached the latter city about the same hour that Comstock & Co. sold the wheat to Pattison. An attempt was instantly made to present the draft, but the drawees could not be found. They were insolvent and failed that day. At three o'clock, P. M., the Indianapolis bank notified the carrier to hold the wheat for the consignors. A similar notice was given later, but on the same day, at the express instance of the defendants; and the wheat was accordingly held until taken by the writ of replevin issued in this suit. The question is, had Pattison a right to possession of the wheat?

A bill of lading is a muniment of title and *quasi* negotiable. But Comstock & Co. did not possess this evidence of title, and, of course, did not endorse it to Pattison; and herein is found an important difference between this case and *Coxe* v. *Harden*, 4 East, 211; *Dows* v. *Greene*, 32 Barb. 490; *Lee* v. *Kimball*, 45 Me. 172, cited by the appellant. In *Whitehead* v. *Anderson*, 9 M. & W. 518, there is language to the effect that if the carrier enters into a new agreement with the consignee, distinct from the original contract for carriage, to hold the goods in custody as his agent, subject

to some new order to be given, then the goods are constructively in the possession of the consignee, and the right of the vender to retake them is gone. But it must be borne in mind that the learned baron was speaking of a case in which the goods had arrived at the port of destination, and the sole question was, whether after such arrival the assignee in bankruptcy of the consignee had done such acts as amounted to a constructive possession, thus terminating the transit and making the carrier his mere bailee for the custody of the goods. It was not an attempt, having no bill of lading or other muniment of title, to sell the goods while in actual transit, as in the case before us.

But in the present case, Comstock & Co., at the time of the sale to Pattison, not only had no actual title to the property, by the very terms of their contract with the appellees, but they possessed no indicia of ownership, neither possession nor the bill of lading, and the wheat was yet upon its voyage. Pattison took not only the risk of stoppage, but also the risk of the title of his vendors, without any act of the appellees to mislead him. If he had found Comstock & Co. possessed of an ordinary bill of lading sent to them by their vendors, indicating ownership by the former, he might have safely purchased, and there would be both reason and authority in abundance for holding that the consignors, having thus put it in the power of Comstock & Co. to exhibit evidence of title, should not afterwards as against him question that title. A mere resale by the vendee does not, however, destroy the right to stop, and we know of no case in which it has been held to do so. 2 Kent Com. 547, and cases there cited in the note.

It is argued that if the right of stoppage existed, it was not in this case well exercised. We are not able to concur in this proposition.

Affirmed, with costs.

A. G. Porter, *B. Harrison*, and *W. P. Fishback*, for appellant.

F. Rand and *R. H. Hall*, for appellees.

RUPP *v.* STITH.

PRINCIPAL AND AGENT.—A. sold to B. a number of sheep, to be delivered at a certain time and place, of a specified quality, and at a stipulated price per pound. On the day agreed upon for the delivery, B. sent a letter to A., stating that on account of sickness he had sent a man to receive the sheep according to contract, directing A. to weigh the sheep and send the weight thereof, and promising to send the money therefor by express; and B. instructed his said agent to receive none but good sheep, which fact was communicated by said agent to A., who delivered a certain number of sheep to the agent, who had a fair opportunity to judge of their quality, and did so judge, and received the sheep as good sheep.

Held, that B. was bound by said action of his agent.

APPEAL from the Vigo Common Pleas.

Suit to recover the price of a number of sheep sold and delivered by the appellee to the appellant.

Issues were formed, which were tried by a jury, who found for the plaintiff, for whom judgment was rendered accordingly, a motion by the appellant for a new trial having been overruled.

It is urged here that the instructions given to the jury were erroneous. The court, of its own motion, instructed as follows: "If you believe from the evidence that Stith sold to defendant a lot of sheep, to be delivered at a future time, for three and one-half dollars per one hundred pounds, at Rockville, and to be of as good quality for mutton as another lot previously sold by plaintiff to defendant; and that on the day of delivery the defendant sent a letter to the plaintiff stating that on account of sickness he had sent a man to receive the sheep according to contract, and for plaintiff to weigh and send the weight of the sheep, and the defendant would send the money by express for them, and also instructed his man to receive no sheep that were not good sheep, and this fact was communicated by his said man to Stith; under this state of facts, if proved, the plaintiff had the right to deliver the sheep to such person, and the person sent had a right to receive the sheep as agent for his prin-

cipal, and to judge of the quality of the sheep, and to reject or receive them according to his judgment; and his judgment is, in law, the judgment of his principal; and if Stith delivered to the agent a certain number of sheep, and the agent had a fair opportunity to judge of the quality of the sheep, and did so judge and receive the sheep as good sheep, his decision is binding upon his principal; and if defendant has sent an incompetent person to act for him, and he has sustained loss by his incompetency or want of judgment, it is his own fault, and not the fault of plaintiff."

The other instructions, given at the request of the plaintiff, were to the same effect.

RAY, J.—The instructions were clearly correct. It was not in the power of the appellant to relieve himself from the obligation imposed by his contract, to receive the sheep at the point agreed upon. He was required to receive or reject at that place, and his agent could not relieve him from this responsibility and change the point of delivery to the inconvenience of the appellee. There can be no question of special agency in this case. The act to be performed was an acceptance or rejection of the property tendered, and the agent appointed to act of necessity had power to bind his principal.

Judgment affirmed, with costs.

J. P. Baird and *C. Cruft*, for appellant.

W. Mack and *J. M. Allen*, for appellee.

The Harrison, New Trenton, Rochester, and Brookville Turnpike Company and Another *v.* Roberts.

Action to Recover Real Property.—*Pleading.*—In an action to recover the possession of real estate, the fact that in one paragraph of the complaint the plaintiff seeks to recover, together with the property claimed in another paragraph, other property taken possession of by the defendant at a different time and under different circumstances, is not a good reason for striking out that portion in relation to such additional claim or the paragraph containing it.

Same.—*Description of Real Estate.*—A complaint against a turnpike company to recover possession of real estate described a portion of the property as "all that part of the south-west quarter of section 33, township 9, in range 2 west, in," &c. (naming the county in which the action was brought), "on which is located and constructed the turnpike road and toll-house of said company"; and described another portion by metes and bounds, "commencing at the south-east corner of said toll-house and running thence east eight and one-half feet," &c., "to the place of beginning."

Held, that the descriptions were sufficient.

Turnpike.—*License.*—When a legally organized turnpike company has located and constructed its road upon land by the verbal license of the owner of the land, the company is entitled to the possession of the roadway, notwithstanding the fact that damages were not assessed or paid nor any other consideration given for the right of way.

Same.—*Toll-House.*—Where, in such case, a toll-house has been erected outside of the roadway, by the license of the owner of the land to use the ground for a toll-house temporarily, such owner or his vendee may recover possession of the ground on which the toll-house is erected, upon his giving the company reasonable notice of the termination of such license, although the toll-house be within the distance from the center of the road to which, under the statute, the company might have condemned the land for a roadway.

Practice.—*Trial Without Reply.*—Where a defendant, without asking a rule for a reply or calling the attention of the court to the fact that no reply has been filed, voluntarily goes to trial as though the facts alleged in his answer had been denied, it is too late after he has been beaten on the trial upon the merits to raise the objection that a reply was not filed.

APPEAL from the Franklin Circuit Court.

This was an action by Roberts against The Harrison, New Trenton, Rochester, and Brookville Turnpike Company and Lewis Riggs, to recover the possession of real estate.

The complaint was in four paragraphs, but a demurrer was sustained to the second.

The first paragraph is in the usual form, and seeks to recover possession of "all that part of the south-west quarter of section thirty-three, township nine, in range two west, in Franklin county, on which is located and constructed the turnpike road and toll-house of said company."

The third and fourth also claim to recover the same portion of the roadway and the ground on which the toll-house is situated. The latter is described as "commencing eighteen feet from the center of the road, and running thence along the same twenty-seven feet west, thence twelve feet north, thence twenty-seven feet east, thence south twelve feet, to the place of beginning." They also include two other strips of ground, one of which is described as "commencing at the south-east corner of the toll-house, and running thence east eight and one-half feet, thence north twenty-six feet, thence west eight and one-half feet, thence south twenty-six feet to the place of beginning." The other is described as "commencing at the south-west corner of the toll-house and running thence west along the road sixty-one feet, thence north twenty-six feet, thence east sixty-one feet, and thence south twenty-six feet to the place of beginning." These paragraphs allege, that, in 1852, when the turnpike company constructed its road over the quarter section of land described, the land was owned in fee by one Richard Tyner, and that the road was so constructed, and the toll-house erected, by the verbal leave and license of said Tyner, given without any consideration whatever, and that the plaintiff is now the owner in fee of said land, deriving his title thereto through said Tyner; and that the defendants hold possession of the other strips of land without any right or authority whatever.

The turnpike company filed an answer of three paragraphs. But the first, a general denial of the complaint, was subsequently withdrawn.

The second paragraph is an argumentative denial of the

plaintiff's right to recover the roadway and toll-house grounds, and claims the same by donation from Tyner, the former owner of the land. It denies that the company had possession of the two strips, and disclaims any right or claim to them.

The third paragraph is the same as the second, except that it alleges a consideration for the donation and grant by Tyner of the roadway and ground for the toll-house. Reply in denial of both paragraphs.

Riggs answered in two paragraphs, first, a denial of the allegations of the complaint; second, that he is in possession of the toll-house under the turnpike company, as its collector of tolls at that place. It admits that he is in possession of the two small strips of ground described in the complaint, but alleges that it is by the leave and license of the plaintiff, which has not expired or been revoked by him. There was no reply to this last paragraph.

The jury who tried the cause returned a verdict in substance as follows: As to so much of the land claimed by the plaintiff as is occupied by the turnpike company's roadway, they found for the defendants. As to that part of the land in controversy on which is situated the toll-house, they found for the plaintiff as against the turnpike company, and assessed the damages at thirty dollars; and as to that portion of the land, they found for the defendant Riggs. As to the parcels of land described as adjoining the toll-house, they found for the plaintiff as against the defendant Riggs, and for the turnpike company, and assessed the damages against Riggs at five dollars.

A motion for a new trial being overruled, Riggs moved the court for a judgment in his favor on the verdict of the jury, for the toll-house and grounds, which was overruled, and the ruling was excepted to.

The turnpike company then moved the court for a judgment in its favor, as to the ground occupied by the toll-house, notwithstanding the verdict of the jury, because, as to that, the finding is for the defendant Riggs, the tenant in posses-

sion; and also for the alleged reason that the only valid cause of action in the third and fourth paragraphs of the complaint is for the strips of ground adjoining the toll-house, as to which the jury found for said turnpike company; which motion was also overruled.

A motion was also made by each of the appellants for a judgment for all costs, which was overruled; and judgment was rendered against the appellants, in accordance with the verdict of the jury, and for costs.

ELLIOTT, J.—Numerous questions are presented in this case, which will be examined in the order in which they are presented in the brief for the appellants.

1. The first is that the court erred in refusing to strike out the third and fourth paragraphs of the complaint, on the appellant's motion. There was no error in this. These paragraphs cover not only the same land, the roadway and toll-house grounds described in the first paragraph, but also the two additional strips adjoining. All might have been included in the first paragraph, and thereby very greatly abbreviated the complaint, which by numerous paragraphs and much unless matter is rendered inexcusably voluminous; but as the plaintiff sought by the third and fourth paragraphs to recover land not included in the first, the court did right in overruling the motion to strike out. The third and fourth paragraphs are, in substance, the same, and both cover the whole property in controversy, and the court would have been clearly justified in striking out the whole complaint, excepting only either the third or fourth paragraph. No substantial injury, however, could have resulted to the appellant by the overruling of such a motion, had it been interposed, and the judgment would not be reversed for such an error.

It is argued by the appellants that the additional claim set up in the third and fourth paragraphs is for ground taken possession of at a different time, and under different circumstances, and has no connection with the cause of

action stated in the first paragraph, and should not be united with it. This is an erroneous view of the case. The substance of the whole complaint is this: that, at the commencement of the suit, the plaintiff was the owner and entitled to the possession of the ground occupied by the road, the toll-house, and the two strips adjoining; that the appellants were in the possession thereof and unlawfully withheld the same from the plaintiff. It could make no difference, if the appellants were in possession as alleged, how or when the possession was acquired, the simple question presented was, did the appellants unlawfully withhold it from the plaintiff, at the commencement of the suit?

2. The court overruled a motion to strike out so much of the third and fourth paragraphs of the complaint as claims to recover the two strips of ground described therein, adjoining the toll-house, and this ruling is complained of. The ruling was correct.

3. Overruling the demurrer to the first, third, and fourth paragraphs of the complaint, is assigned for error. The first paragraph is good, at least so far as it seeks to recover the ground occupied by the toll-house; and the third and fourth paragraphs are good, for the recovery, at least, of the two strips adjoining the toll-house. These paragraphs admit that the turnpike company was a legally organized corporation, and constructed its road over the land now held by the plaintiff, in 1852, and has ever since maintained it on the same location; and that it was so located over said land by the leave and license of Tyner, who was then the owner of the land.

The turnpike company had the right to appropriate so much of the land as was necessary for the roadway, by paying the damages occasioned thereby, and if, as the third and fourth paragraphs admit, the road was located and constructed upon the land which the plaintiff now seeks to recover, by the verbal license of the then owner of the land, the right of the company to the possession of the roadway would be absolute; and the fact that damages were not as-

sessed or paid or any other consideration given for the right of way, would not affect the company's right of possession; and hence the third and fourth paragraphs do not show any cause of action in the plaintiff for the recovery of the ground occupied by the road.

But it is urged that the complaint does not contain such a description of the ground in controversy as to enable the sheriff to locate it. We think otherwise. The road and toll-house are visible objects, and need no further description than that contained in the complaint, and they form the monuments for the commencing point in the description by metes and bounds of the other grounds claimed in the complaint.

4. The court struck out a portion of the second paragraph of the answer of the appellant Riggs, and this ruling is complained of. The part stricken out was an averment that the road and toll-house belonged to the turnpike company. It was not material to the affirmative defense attempted to be set up by that part of the answer that alleges that he, Riggs, was in possession of the strips of ground adjoining the toll-house by the leave and license of the plaintiff, which had not expired or been revoked. Indeed, the whole answer is rather an argumentative denial that he unlawfully withheld the possession of the property from the plaintiff, and was fully covered by the general denial, and the whole paragraph might, with propriety, have been rejected.

5. The next point raised is, that the finding and judgment, under the pleadings, should have been in favor of the appellant Riggs, as to the ground adjoining the toll-house, because there was no reply filed to the second paragraph of his answer, which set up a right to the possession thereof by the leave and license of the plaintiff, which had not expired or been revoked, and that the facts so alleged must, therefore, be deemed to be admitted.

From what has just been said in reference to the second paragraph of Riggs' answer, we are not prepared to say

that a reply was necessary. But however that may be, Riggs, without asking a rule against the plaintiff to reply to the answer, or in any manner calling the attention of the court to the fact that no reply had been filed, voluntarily went to trial upon the facts alleged, as though they were denied; and it was too late, under several recent decisions of this court, after he was beaten on the trial upon the merits, to raise the objection that a reply was not filed.

6. On the trial, the plaintiff's right to recover the ground on which the toll-house is situated was made to turn on the question whether Tyner, who owned the land at the time, and by whose permission the toll-house was built thereon, gave such permission for the permanent location of the toll-house, or only temporarily, and for a limited period.

The plaintiff introduced evidence tending to show that the directors of the company, when the toll-house was built, only placed it at the point in controversy temporarily, intending to move it to another site off of Tyner's land, as soon as the road was completed, and that Tyner only gave permission for its location on his land temporarily and for a limited time. The appellants had taken the deposition of Tyner, in which was the following interrogatory and answer thereto: "Question 10. State what your intention was as to the ground you permitted them (the turnpike company) to occupy for said toll-house?" "Answer. I did not reflect much about it, but suppose I intended them to occupy the ground as long as it was needed for toll-house and gate." On the plaintiff's motion this question and answer were suppressed, and the ruling is assigned for error. We cannot say that the question and the answer to it were improperly suppressed. The point in controversy was as to the agreement between the parties in reference to the ground on which the toll-house was built; but the question asked Tyner is not what was the agreement or understanding between him and the company, but what was his intention as to the matter.

The mere unexpressed intention of Tyner could confer no authority on the company. And the answer is still further from the point. It does not even state the intention entertained at the time. The witness says he did "not reflect much about it," but then states what he now supposes was his intention. The answer is too uncertain and indefinite to be entitled to any consideration as evidence upon the question involved in the case.

7. On the trial of the cause, one William Shanks was introduced and examined as a witness by the plaintiff, and was permitted to testify, over the objection of the appellants, that, in 1852 or 1853, he was present at a meeting of the board of directors of the company, of which Tyner was a member, at the store of Tyner, in Brookville, or at the store of Chambers, in Cedar Grove, and heard Tyner and the members of the board say that the location of the toll-house where it then was, and still is, was not a permanent one; that it was placed there for the convenience of the company, but would be moved up to Stavetown, to catch the Blue Creek travel. The correctness of this ruling is also questioned. The evidence was clearly admissible. The directors were the legal representatives of the corporation. The conversation testified to was had at an official meeting of the directors. Tyner, on whose land the toll-house was erected, was a director, and present at the meeting, and it occurred in a comparatively short time after the toll-house was built, and amounted to an admission, by the directors, as well as Tyner, that the toll-house was placed on Tyner's ground temporarily, and would be moved to another place.

8. The court also permitted the plaintiff, Roberts, to testify, over the appellants' objection, as follows: "I was present at the meeting of the board at the time Tyner authorized the erection of the toll-house. The board had met to arrange for building toll-house and letting the road. They had selected a spot close to a spring. Mr. Tyner asked if it would annoy me to build the toll-house there. This was at a meeting of the board at my house.

I told him I was a mere tenant of his place; if it annoyed me, I could leave the place. He remarked that he did not intend to have any thing placed there that would annoy his tenants, and that it was his building spot that he expected to build on some day. The directors did not seem to think they wanted the house there permanently; that they thought the house would be better situated at the Blue Creek crossing, after the completion of the road into town. This was about all that was said about it. Mr. Tyner said he could not have it there as a permanent location; that he expected to build a house near the spring."

The admission of the evidence is urged as an error. The objection made to it on the trial was, that it was improper evidence. It is claimed in argument here, that it detailed a conversation between the plaintiff and Tyner, in the absence of the directors of the company. We do not so understand the record. The whole conversation, as we understand it, occurred at the same time, and was held between Tyner and the other directors at a meeting of the board. It is further urged that the statement, that "the directors did not seem to think they wanted the house there permanently; that they thought the house would be better situated at the Blue Creek crossing," &c., was not stating any thing said by the directors, but an attempt to state what they thought. It was, doubtless, intended as a statement of the purport or substance of what was said by the directors, but couched in loose and careless language. But the statement was not material, and could not have injured the appellants. The real question in controversy was, whether Tyner consented to or licensed the erection of the toll-house there permanently, or only temporarily; and it was his statements to the directors on that subject, as detailed by the witness, that formed the material part of the evidence, and was properly admitted.

9. There was no error in the refusal of the court to permit the appellants to read in evidence certain extracts from the records of the turnpike company, one directing notice

that sealed proposals would be received for the erection of a toll-house near Tyner's lock, and another recording the acceptance of one of said bids. The evidence was properly rejected, for the simple reason that it was entirely irrelevant, and could not have had even a remote bearing on any question in controversy in the case.

10. The court voluntarily instructed the jury, in reference to the ground on which the toll-house is located, that the company was authorized by its charter to condemn land for its roadway, by legal proceedings, of such width as the directors deemed advisable, not exceeding sixty feet, or might procure the same by contract with the owner; and if the company constructed its road over the land of Tyner by his verbal license, and if there is no evidence that any definite width was agreed upon or taken by the company, it must be presumed that the company took only so much as was used in constructing the road. So much it can hold under the verbal license, but no more. And if the land was thus taken for the roadway, and if the toll-house was located within the limits of the land so taken, the plaintiff cannot recover. But if the house was placed outside the limits of the roadway, then the plaintiff is entitled to recover the ground, unless the company holds it by a license from Tyner; that under its charter the company could condemn ground for a toll-house, but Tyner could waive that, and license the occupancy of the ground for that purpose; and if he granted such license without limit, as to time, and the company erected the toll-house pursuant thereto, the the plaintiff cannot recover; but if it was a license to use the ground only temporarily, then upon reasonable notice to the company of the termination of the license, it would cease; and if Roberts has given such notice he should recover that part of the ground.

It is contended that the court erred in instructing the jury under the state of facts upon which that part of the charge is hypothecated, that if the toll-house was placed outside the limits of the roadway, then the plaintiff is en-

titled to recover the ground, unless the company holds it by a license from Tyner.

The argument in support of the objection is, that although there was no condemnation of the roadway by legal proceedings, and the road was constructed over the land then owned by Tyner, by his verbal license, without any agreement as to the width, and though only from thirty to thirty-six feet in width was used or occupied by the roadway proper, still, as the company had the right to condemn sixty feet in width, and the toll-house ground would be covered by thirty feet from the center of the road, it must be presumed that, at that particular point, the company used and appropriated under the license the ground on which the toll-house stands, as a part of the roadway.

This argument is without any substantial foundation to rest upon. The evidence clearly shows that the toll-house stood outside of the ground used as a roadway, and was so understood by the company and Tyner, and hence its erection at that point was made the subject of a special license; it was never claimed by the company as being within the limits of the roadway. Besides, the instruction is based on the hypothesis that it was outside of the roadway, and whether it was or was not was a question of fact for the jury, and there is no legal presumption arising in the case to override the facts.

11. An objection is urged to a part of an instruction given by the court to the jury, in reference to the strips of land claimed by the plaintiff adjoining the toll-house, to which the company disclaimed any interest.

That part of the instruction objected to was, in substance, that if the plaintiff had given in evidence a deed conveying the land to him which includes those strips, that would *prima facie* entitle him to the possession; and if Riggs was in the possession of the strips, not claiming under the turnpike company, but under the plaintiff, the jury should find for the plaintiff as to them, against Riggs, unless he has shown a right to such possession.

It is contended that the instruction changed the burden of proof from the plaintiff to the defendant Riggs, and required of the latter, who was in possession, to prove his right thereto, instead of requiring the plaintiff to prove his right to possession. But this is so clearly an erroneous construction of the instruction of the court that comment upon it is unnecessary. The instruction was correct.

12. We think the verdict of the jury is sustained by the evidence, and fully disposes of the case. One paragraph of Riggs' answer was a general denial of all the allegations of the complaint. He was the mere agent of the turnpike company, and as such his possession of the toll-house was the possession of the company; and as to that the jury did right in finding for Riggs and against the company.

But the turnpike company did not claim the strips adjoining the toll-house, and was not in possession of them; but they were in the individual possession of Riggs. So it appears by the evidence. And as the jury, in effect, found that Riggs' possession was unlawful, and the plaintiff entitled thereto, the finding for the company as to those strips, and against Riggs, was correct. The failure of the plaintiff to reply to the second paragraph of Riggs' answer is urged as a reason why the verdict is erroneous. But as that question has been disposed of in a previous part of this opinion, it need not be noticed further.

13. The several motions, first, by Riggs for a judgment in his favor for the toll-house and grounds; second, by the turnpike company for a judgment in its favor, *non obstante verdicto;* and third, by each of the appellants for all costs, were correctly overruled.

The judgment is affirmed, with costs.

T. B. Adams and *F. Berry*, for appellants.

C. C. Binkley, for appellee.

NELSON *v.* THE CITY OF LA PORTE and Another.

CITY.—*Lighting Streets.—Statute Construed.*—In the sixty-eighth section of the act of 1867, for the incorporation of cities, the words, "for lighting such street according to the general plan of such improvement in said city," embrace the street fixtures necessary for the purpose referred to, including the pipes and lamp posts; and in the twenty-eighth clause of the fifty-third section, the words, "the expense of lighting any street," refer only to the expense of lighting after the fixtures have been put up. In the former case, the expense cannot properly be assessed upon real property in proportion to its appraised value.

APPEAL from the La Porte Circuit Court.

GREGORY, C. J.—The common council of the city of La Porte, in July, 1867, passed an ordinance establishing a certain lamp district, with a view of lighting a part of the city with gas, and provided as follows:

"All the cost of erecting and fitting the lamp posts shall be charged against the real property subject to taxation for general purposes in such lamp district, and an *ad valorem* tax shall be assessed upon said property for the payment thereof. * * All such taxes * * * shall be placed on the duplicate in proper separate columns, and collected as other taxes are collected."

A second ordinance was passed July 8, 1867, erecting the territory for one hundred and twenty-one feet in width on each side of a portion of West Main street, into another lamp district, and providing that all the provisions of the previous ordinance should be applied to this lamp district.

Under these ordinances, permanent iron lamp posts were erected at alternate diagonal corners along West Main street, and an *ad valorem* tax on account of the cost was assessed against Nelson.

Under this assessment the city collector levied on Nelson's property, for which this suit was brought.

An agreed case was made, which included the ordinances and facts above referred to, and also stated that the blocks along West Main street are two hundred and forty-two feet

square, with alleys twelve feet wide running at right angles to the street. That the appellant owned a lot and a half within the district, one lot fronting one hundred and fifteen feet—the length of the lot—on West Main street, and the width of the lot and one half, one hundred and twenty-one feet, fronting on the cross street, on which he had valuable brick buildings, and that some of the lots on the street were unimproved.

The agreed case concludes as follows:

"Now, if, according to the city charter law of 1867, such cost of said lamp posts might legally and properly be charged equally and exclusively against all the lots and improvements in said lamp district according to the respective values thereof, as appraised for general purposes of taxation, then the court will give final judgment for the defendants; but if such was not the true and proper rule under the law for apportioning said lamp post tax, then the court will find for the plaintiff and assess his damages at one cent."

The court found for the defendants, and the proper motions were made, and exceptions taken, to reserve the question for this court.

There is, then, but this one question in the case:

Is an arbitrary assessment against all the land and improvements in a lamp district, in proportion to their appraised value, and without reference to linear frontage on the street improved, or to the proportionate and actual benefits, the true rule for apportioning the burdens of such improvements?

The solution of this question turns upon the construction to be given to the twenty-eighth clause of section fifty-three, in connection with sections sixty-eight, sixty-nine and seventy, of the act of 1867, for the incorporation of cities. These provisions, so far as they relate to this subject, are as follows: "The common council shall have power to enforce ordinances: * * *

"Twenty-eighth. To construct and establish gas works, or to regulate the establishment thereof by individuals or

companies, or to regulate the lighting of streets, public grounds, and buildings, and to provide, by ordinance, what part, if any, of the expense of lighting any street, or alley, shall be paid by the owners of lots fronting thereon, and in what manner the same shall be assessed and collected, and to make the same a lien upon real estate * *.

"Sec. 68. When the owners of two-thirds of the whole line of lots or parts of lots (and measuring only the front line of such lots as belong to persons resident in such city) bordering on any street or alley, consisting of one whole square between any two streets crossing the same, or if the common council deem it expedient, for any reasonable distance upon any square or alley, less than one whole square or block, shall petition the common council * * "for lighting such street according to the general plan of such improvement in said city, the common council may cause the same to be done, by contract, given to the best bidder, after advertising to receive proposals therefor * *.

"Sec. 69. In all contracts specified in the last preceding section, the cost of any such improvement shall be estimated according to the whole length of the street or alley, or the part thereof to be improved, per running foot, and the city shall be liable to the contractors for so much thereof only as is occupied by public grounds of the city bordering thereon, and the crossings of streets and alleys; and the owners of lots bordering on such streets or alleys, or the part thereof to be improved, shall be liable to the contractors for their proportion of the costs, in the ratio of the first line of the lots owned by them to the whole improved line. * * *.

"Sec. 70. When any such contract shall be made, or shall have been heretofore made, and shall have been in progress of fulfilment, the common council shall have power to cause estimates to be made from time to time, of the amount of work done by the contractors, and to require such amount to be paid to him, deducting a reasonable per centage to secure the completion of the contract, until the

whole shall be finished, and to prescribe the time within which the whole shall be completed; and such estimate shall be a lien upon the ground upon which they are assessed, to the same extent that taxes are a lien, and shall have the same preferences over other demands. The common council, with the concurrence of two-thirds of the members thereof, may order or cause any or all of the improvements mentioned in the preceding section, * * * without such petition, and either charge and cause any or all the expenses thereof to be assessed and collected as hereinafter provided when petition is made, or if it is deemed just and right by the common council, to cause such expenses, or any part thereof, to be paid out of the general revenue of the city."

These provisions, in our judgment, can all be harmonized, and when read together they do not seem difficult of construction.

The words, "for lighting such street according to the general plan of such improvement in said city," in the sixty-eighth section, embrace the street fixtures necessary for the purpose, including the pipes and lamp posts. The words, "the expense of lighting any street," in the twenty-eighth clause of section fifty-three, refer only to the expense of lighting after the fixtures are put up.

That which must be made under contract according to the general plan, for which under section seventy estimates may be made from time to time, during the progress of the work, must, of necessity, embrace only the street fixtures, which may be completed, and made ready for use; but, in the nature of things, the keeping the lamps lighted must, if done under contract, be done under a continuing contract. The expense of the former can only be met by an assessment on property holders bordering on such street per running foot, the expense of the latter may be assessed and collected on and from the owners of lots fronting on such street, in any manner the common council may determine, not inconsistent with the constitution and laws of this State.

Under the agreed state of facts, the appellant was entitled to judgment.

Judgment reversed, with costs; cause remanded, with directions to render judgment for the plaintiff on the agreed statement of the facts.

J. B. & W. Niles, for appellant.

M. K. Farrand, for appellees.

BAGOT and Others *v.* THE STATE, on the Relation of DENNISON.

PRINCIPAL AND SURETY.—*Official Bond.*—Where A. was requested to become a surety on a sheriff's official bond by B., a person having no connection with the bond, which was not then present, and A. told B. that the latter might sign the name of the former to the bond, provided that C. and D. first executed it, and, A. never having seen the bond, never having been requested by said sheriff to execute it, and never having had any communication in relation to the bond with said sheriff or any other person, except B., the name of A. was signed by B. to the bond, which was never executed by C. or D.;

Held, that A. was not bound as a surety.

SAME.—*Sheriff's Return.*—A sheriff's return to an execution, showing the collection of the money thereon, is conclusive upon the sureties on his official bond in a suit on such bond on the relation of the execution-plaintiff for the failure of the officer to pay over such money.

APPEAL from the Ripley Common Pleas.

FRAZER, J.—This was a suit upon a sheriff's bond, against the principal and sureties, the breach alleged being the failure of the sheriff to pay the money collected for the relator upon an execution. The appellants severally answered *non est factum* under oath. Other paragraphs of answer of the same character and amounting to the same thing were filed, but, of course, they need not be noticed. The general denial was also pleaded. There was a verdict for the plaintiff, a motion for a new trial overruled, and judgment upon the verdict.

It appeared in evidence that the appellant Walter Bagot never saw the bond, and never executed it in person, and never was requested by the sheriff to execute it; but his name was signed to it by one William Bagot at his request. He then offered to prove that William Bagot, a person having no connection with the bond, applied to him to become surety on the bond, which was not then present; that he told said William that he might sign his name to the bond provided Elias Conwell and James White first executed it, but not otherwise, and that he never had any communication with the sheriff or with any other person except said William relative to said bond. The court refused to admit this evidence, and thereon arises one question which requires our consideration.

The bond sued on in evidence appeared on its face never to have been executed by either Conwell or White, and we are at a loss to conceive the reason by which the court below was guided in excluding the evidence tendered. The appellee aids us with no argument whatever. If it was proper for the appellant Bagot to maintain his defense by any proof, we think that which he offered was admissible, and if credited must have been decisive.

The sureties all offered to prove that the return to the execution, showing the collection of the money, was false, that in fact no money was collected upon it; but this evidence was also rejected. The question which arises upon this ruling is, whether the officer's return was conclusive upon the sureties. Counsel for the appellants, though insisting that this inquiry must be answered in the negative, have been content to cite no authority whatever, and we are not aware of any of that import. We understand the general rule to be, that the return is conclusive, a rule to which there are, however, some exceptions. It is certainly conclusive against the sheriff himself; and if it fixes his liability, it must also bind the sureties, whose liability is coextensive with his. The return binds the relator and prevents him from using further final process to make the amount

of his judgment, which is shown by the return to be satisfied. His claim is lost, unless he has some remedy for the official dereliction of the officer. It might be said that he should have assigned for breach of the bond, that the return was false. But it would be very inconvenient and burdensome to compel the judgment plaintiff to ascertain the fact, and the result would probably be simply that both breaches would, for safety, be assigned in every such suit. So there would be no advantage gained by the sureties in the end. It seems to us quite as well, therefore, that the return should be held to be conclusive upon the sureties. A somewhat similar question was involved in *The State, ex rel., &c.*, v. *Grammer*, 29 Ind. 530. There, however, the report of the officer was not a record, like a sheriff's return, importing verity, and the case was not quite so strong as the one now in hand; but we held that the sureties could not controvert the report which the officer had made in compliance with the requirements of law.

There is some question made on behalf of the appellant as to whether the bond sued on was approved as the law requires in cases of official bonds. It is conceded that it is valid anyhow as a common law obligation, and we have not therefore seen any occasion for an examination as to its sufficiency as a statutory bond.

Judgment against Bagot reversed, with costs, and remanded for a new trial; and against the other appellants affirmed, with costs.

H. W. Harrington and *M. K. Rosebrugh*, for appellants.

Watts *v.* McAllister.

Pleading.—*Complaint.*—*Deceit.*—*Contract.*—A complaint by A. against B. alleged, that on, &c., there was a litigation anticipated between the plaintiff

and one C., arising out of an alleged case of bastardy; that the defendant having knowledge of said fact, reported to the plaintiff, that, for two hundred and fifty dollars, he could and would compromise and settle it and procure a release; that afterwards, the defendant informed the plaintiff that he had compromised it for two hundred dollars, and had taken a bond in the sum of one thousand dollars, from C., D., and E., not to institute suit against the plaintiff for said bastardy; that thereupon plaintiff executed to defendant two notes, one for one hundred dollars, and the other for one hundred and fifty dollars, the first of which was paid at maturity, but the other remained unpaid and was still in the possession of defendant; that after the payment of said first note, plaintiff was arrested on account of said alleged bastardy, and then first learned, and it was true, that he had been deceived and imposed on by the defendant, who had never compromised the anticipated litigation, or attempted to do so; that said notes were executed in consideration of the false and fraudulent pretense and representation aforesaid, and for no other consideration; that in consequence of said false and fraudulent representation and pretense, by which his signature to the notes was obtained, "and the failue of defendant to comply with his said agreement," the plaintiff had been damaged in, &c.

Held, that this was a complaint for deceit, and not on contract.

APPEAL from the Montgomery Circuit Court.

GREGORY, C. J.—Suit by Watts against McAllister for fraud and breach of contract. The complaint is in two paragraphs. The first alleges, that in June, 1867, there was a litigation anticipated between the plaintiff and one Castor, arising out of an alleged case of bastardy; that the defendant, having knowledge of the anticipated litigation, reported to the plaintiff, that for the sum of two hundred and fifty dollars, he could, and would compromise and settle it, and procure a release; that afterwards the defendant informed the plaintiff that he had compromised it for two hundred dollars, and that he had taken a bond in the sum of one thousand dollars from said Castor, Isaac Castor, and Jonas Jones, not to institute suit against the plaintiff for said bastardy; that thereupon the plaintiff executed to defendant two notes, one for one hundred dollars, and the other for one hundred and fifty dollars; that the first note was paid at maturity, but that the other remains unpaid, and is still in the possession of the defendant; that subsequent to the payment of the first note, the plaintiff was arrested on ac-

count of the alleged bastardy, and then learned for the first time, and avers it to be true, that he had been deceived and imposed on by the defendant; that McAllister had never compromised the anticipated litigation, or attempted it; that the notes were executed in consideration of the false and fraudulent pretense and representation before mentioned, and for no other consideration whatever; that in consequence of said false and fraudulent representation and false pretense by which his signature to the notes was obtained, *and the failure of the said McAllister to comply with his agreement*, he has been damaged in the sum of one thousand dollars.

The other paragraph avers a contract, by which McAllister agreed to procure a compromise and release of the anticipated litigation between the plaintiff and Castor, for the alleged bastardy, for two hundred and fifty dollars, the payment of one hundred dollars thereof, and a breach of the contract. A demurrer to each paragraph of the complaint, for want of sufficient facts, was overruled as to the first, and sustained as to the second.

It is not pretended, in the argument of appellee's counsel, that the second paragraph of the complaint is bad, but it is urged, that the error of the court below in sustaining the demurrer thereto did not injure the plaintiff, as the same cause of action is embraced in the first. We do not think so. The first paragraph is for deceit; the second is on a contract. There is no allegation in the first that Watts assented to the proposition of McAllister, that he could and would compromise and procure a release of the bastardy case. To make a contract, two minds must meet. It is contended, however, that the statement in italics supplies the want of this averment. This position cannot be sustained. There is no "*agreement*" to which this statement can apply; it is mere surplusage. Proof of the contract alleged in the second paragraph of the complaint would not sustain the first. Under the code, it would be a failure of proof, and not a mere variance. It is claimed that the complaint

is bad for a misjoinder of causes of action. It is enough to say that the demurrer was not for a misjoinder of causes of action, but, that the complaint did not state facts sufficient.

The court below erred in sustaining the demurrer to the second paragraph of the complaint.

Judgment reversed, with costs; cause remanded, with directions to overrule the demurrer to the second paragraph of the complaint, and for further proceedings.

P. S. Kennedy, *R. H. Galloway*, and *J. McCabe*, for appellant.

J. M. Butler, for appellee.

Musselman v. The State.

Practice.—*Appeal.*—*Criminal Law.*—In a criminal case, the defendant may appeal, only when the judgment below is against him.

APPEAL from the Cass Common Pleas.

Frazer, J.—This was an information against the appellant for barratry. The court, of its own motion, continued the cause until the next term, though the defendant objected and insisted upon his constitutional right to a speedy trial. At the next term, a *nolle prosequi* was entered, and he was discharged. He appeals to this court, merely, as it is said, to settle the question as to whether the court should have given him a trial at the first term. This interesting question cannot, however, be solved in this cause by this court, for the reason that it is beyond our reach. In a criminal case, a defendant may appeal, only when the judgment below is against him. 2 G. & H. 425, sec 148.

Appeal dismissed at appellant's costs.

P. H. Ward, for appellant.

THOMPSON *v.* THE HONEY CREEK DRAINING COMPANY.

DRAINING ASSOCIATION.—*Suit on Assessment.—Pleading.*—In a suit to enforce an assessment on lands under the ditching law, the exhibit annexed to the complaint, and referred to therein as the appraisers' schedule of assessment, consisted merely of a number of columns containing separately the name of the defendant, the description of each tract of land, the value per acre of each tract, and the total assessment on each tract, the columns being headed, "Name of Owner," "Description," &c., and the amount of the last column being placed at its foot.

Held, that the exhibit was insufficient, and rendered the complaint bad on demurrer.

APPEAL from the White Common Pleas.

This was a suit by the appellee against the appellant to enforce an assessment on lands of the defendant, under the ditching law.

It is alleged in the complaint, that the "appraisers made out a list of all lands affected, and assessed to each tract of land, separately, the amount of benefit or injury, and made out a schedule of the same, with the assessment on each tract of land therein described, separately; and that they did append thereto their affidavits, that the same was a true assessment in all respects, to the best of their judgment and belief; a copy of which schedule of assessment is filed herewith, marked 'D,' and made a part of this complaint."

The instrument annexed to the complaint and marked "D" consists merely of a number of columns containing separately the name of the appellant, the description of each tract of land, the value per acre of each tract, and the total assessment on each tract, the columns being headed, "Name of Owner," "Description," &c., and the amount of the last column being placed at its foot.

A demurrer to the complaint for want of sufficient facts was sustained, and the appellant excepted.

FRAZER, J.—The exhibit "D" annexed to the complaint is the instrument upon which the action was founded. It amounts to nothing, and is wholly insufficient. It is with-

out signature or the affidavit which the statute imperatively requires to give it validity. Besides, it does not even purport to be what the complaint avers. The demurrer to the complaint should have been sustained.

Judgment accordingly, with costs.

R. W. Sill, *S. A. Huff*, and *B. W. Langdon*, for appellant.

S. E. Perkins, *O. F. Baker*, and *S. E. Perkins, Jr.*, for appellee.

Blair and Others *v.* Vierling.

Liquor Law.—*License.*—*Change of Venue.*—*Appeal.*—Where an appeal has been taken to the circuit court or court of common pleas from the decision of the board of county commissioners in a proceeding to obtain a license under the temperance act of 1859, resisted by remonstrance, a change of venue may be granted, as in other "civil actions." No appeal lies to the Supreme Court from the judgment of the court to which such change is taken.

APPEAL from the Daviess Circuit Court.

Gregory, C. J.—The appeal in this case must be dismissed.

In *The State* v. *Vierling*, at this term, *ante*, p. 99, it was held that the change of venue was properly granted from the Gibson to the Daviess Circuit Court.

This was a proceeding commenced before the commissioners of Gibson county, to obtain a license under the temperance act of 1859, to retail intoxicating liquors by a less quantity than a quart at a time. By the act of March 17th, 1861, the judgment of the circuit court, in such cases, is final, and without appeal therefrom. Acts 1861, p. 143, sec. 2.

Appeal dismissed, with costs.

Frazer, J., was absent.

D. F. Embree, for appellants.

A. C. Donald and *C. A. Buskirk*, for appellee.

SCHNEIDER *v.* RAPP.

EVIDENCE.—*Cross Examination.—Alteration of Written Instrument.*—On the trial of an action on a promissory note given for a quantity of barley sold by the payee to the maker, where the question at issue was, whether the note was executed for the sum specified therein or was made for a sum one hundred dollars less and altered by the payee to the greater sum, the maker, called as a witness by the plaintiff, testified that the signature was his, but, over the plaintiff's objection, further testified that the note had been so altered by the payee after its execution; that the maker could not read English writing; that the note was written by the payee and by him read to the maker as for the smaller sum; whereupon, the payee on his own behalf testified that the sum of one hundred dollars was to be paid in cash on the barley; that when he was writing the note, the maker said he could not then pay the one hundred dollars, whereupon he wrote the note for the larger sum. On cross examination, the payee was asked, whether, when he wrote the note, and before it was signed, he stated to the maker that it was for the smaller sum, and whether he did not so read the note to the maker, which question being objected to as not proper cross examination, the court refused to permit it to be answered.

Held, that such refusal was error.

APPEAL from the Ripley Circuit Court.

Suit by Rapp against Schneider, who is the appellant in this court.

The complaint is in two paragraphs. The first is on a promissory note, alleged to have been executed by Schneider to Rapp, for two hundred and ninety-two dollars and seventy-four cents, dated April 15th, 1867, and due five months after date.

The second paragraph is also on a promissory note, executed by Schneider to Rapp for two hundred and ninety-seven dollars, dated April 15th, 1867, payable twenty days after date.

Schneider answered in two paragraphs. The first is to the first paragraph of the complaint, and is verified by affidavit. It alleges, that the note named in that paragraph was executed for the sum of one hundred and ninety-two dollars and seventy-four cents; that the plaintiff wrote the note and read it to the defendant for that sum; that since the execution and delivery of the note, the word "one" has been

altered and changed on the face of the note, thereby making it call for two hundred and ninety-two dollars and seventy-four cents, instead of one hundred and ninety-two dollars and seventy-four cents; and that the note is not the act and deed of the defendant, and he never executed the same.

The second paragraph is to both paragraphs of the complaint and alleges, that said notes were given in consideration of two hundred and eighty-seven bushels of barley, sold by the plaintiff to the defendant, to be used for brewing; that the plaintiff, at the time of said sale, warranted said barley to sprout, "fit to make good beer;" that the defendant subjected said barley to the proper process for sprouting, but that it did not and would not sprout; that it was old and unfit for brewing, and was wholly worthless; but that if it had been good barley and had sprouted, as warranted, it would have been worth five hundred and fifty dollars; and he claims damages in the sum of five hundred dollars.

Reply in two paragraphs, first, the general denial; second, that the notes were executed three weeks after the last lot of barley was delivered, and after the defendant had used a part of each lot sold; that the defendant, when he executed the notes, knew that said barley was damaged, and it was then agreed between the parties that the plaintiff should deduct from the price thereof the sum of fifty dollars, in full satisfaction of the damages for the injured condition of the barley, which he then did, and said notes were executed for the residue.

A trial of the issues, by a jury, resulted in a verdict for the plaintiff for the whole amount of both notes.

A motion for a new trial, made by the appellant, was overruled, and judgment was rendered on the verdict.

ELLIOTT, J.—The questions presented to this court upon the record before us arise upon the ruling of the court in overruling the appellant's motion for a new trial.

A bill of exceptions shows that on the trial of the cause

the appellant offered to read in evidence to the jury the note for two hundred and ninety-two dollars and seventy-four cents, referred to in the first paragraph of the complaint, but the court refused to admit the note in evidence, under the first paragraph of the answer, without proof of its execution. The appellee then called the appellant as a witness, who testified that the signature to the note was his; but on cross examination, and over the appellee's objection, he further testified, that when he signed the note it was for only one hundred and ninety-two dollars and seventy-four cents, and had since been altered, both in the figures in the margin, and in the statement of the amount in the body of the note, to two hundred and ninety-two dollars and seventy-four cents; that he could not read English writing; and that the appellee wrote the note in his presence, and then read it to him as being for one hundred and ninety-two dollars and seventy-four cents. At the close of this evidence, the court permitted the appellee to read the note in evidence to the jury. After which the appellee was sworn and testified as a witness in his own behalf, and upon his examination in chief testified, that the note had not been altered since its execution; that the appellant had promised to pay him one hundred dollars cash on the barley, and supposing he would do so, he, the witness, commenced to write the note for one hundred and ninety-two dollars and seventy-four cents, and had made the figures on the margin accordingly, when the appellant said he could not then pay the one hundred dollars; whereupon, he, the witness, wrote the note for two hundred and ninety-two dollars and seventy-four cents and changed the marginal figures to correspond with that amount.

On cross examination, the witness was asked, whether, "when he wrote the note and before it was signed, he stated to the appellant that it was for one hundred and ninety-two dollars and seventy-four cents, and whether he did not so read the note to the appellant." The question was objected to, on the ground that it was not a cross examination of any

matter brought out by the appellee, and was a matter that should be properly introduced by the appellant in support of his answer. The court sustained the objection and refused to permit the question to be answered. The appellant excepted to this ruling of the court, and urged it as a reason for a new trial, and now assigns it for error.

We think the question should have been answered. It related directly to the matter about which the appellee had testified on his examination in chief, and was clearly a proper inquiry on cross examination.

The whole evidence in the case relating to that note tends very strongly to show that the only consideration for the note was a particular lot of barley sold by the appellee to the appellant, and for which there was only due the appellee one hundred and ninety-two dollars and seventy-four cents, which if true would go far to strengthen the claim of the appellant that the note was either altered after its execution, or was erroneously read to the appellant by the appellee, and we cannot say that the answer to the question, had it been permitted, would not have added strength to the other evidence on that point. The question at issue between the parties was an important one, and involved moral turpitude on one side or the other, and the broadest latitude, consistent with established rules of law, should have been allowed in the examination of it, and especially as the parties to the suit were the principal witnesses. But it is contended on the part of the appellee that, under the first paragraph of the answer, the burden was upon the plaintiff to prove the alteration of the note as alleged; that the court erred in refusing to allow the note to be read in evidence without proof of its execution, and that the whole evidence of the appellee was out of time. The question upon whom rests the burden of proof under such an answer need not be discussed, because it is not material in this case. The note had been given in evidence before the appellee was examined as a witness, and if any further evidence on the

part of the appellee as to the execution of the note was premature, still as it was his own voluntary act, he cannot derive any advantage from it. The evidence given by him on his examination in chief was material, and went to the jury, and the appellant should have been allowed the opportunity of a full cross examination.

Another question is discussed by the appellant's counsel, arising upon instructions given by the court to the jury, as to the proper measure of damages upon the breach of warranty under the second paragraph of the answer, and on the refusal of the court to give certain instructions asked by the appellant on the same subject. But as the jury found specially that no such warranty was made, the question raised upon the instructions is an immaterial one, and an examination of it here is unnecessary.

The judgment is reversed, with costs, and the cause remanded for a new trial.

H. W. Harrington and *M. K. Rosebrugh*, for appellant.

W. D. Willson, for appellee.

THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY *v.* MCKINLEY.

33 274
161 213
161 214

RAILROAD.—*Unnecessary Injury to Lands.—Suit for Damages.*—The charter of a railroad company provided, that "in all cases where the owners of land or stone necessary for the use and construction of said road shall refuse to relinquish the same to the corporation, or shall refuse to accept a fair compensation therefor, it shall be lawful for the corporation, by their president or any superintendent, agent, or engineer employed by them, to enter upon and take possession and use the same, avoiding in all cases unnecessary damage or injury to the owners or proprietors;" and the charter then provided the mode of the assessment and payment of the damages to the land-owner.

Held, that the damages to be assessed and paid in the mode prescribed by the charter were those resulting from a construction of the road with care,

skill, and prudence, not only as to the safety of persons and property passing over the road, but also as to the protection and safety of the property holder; and that if by reason of any want of care, skill, or prudence for the protection and safety of the land-owner, his property was unnecessarily damaged in the construction or repairing of the road, he might recover therefor in an action for damages as at common law.

APPEAL from the Putnam Circuit Court.

GREGORY, J.—McKinley sued the railroad company for injury to his lands. A demurrer was sustained to the first paragraph of the complaint. The second paragraph substantially sets up that the defendant is a corporation, organized under the laws of this State, and owns and operates a railroad in the county of Clay, in said State; that the plaintiff is the owner of certain tracts of land in said county of Clay; that there is a stream called Croy's creek running through said lands from north to south, passing through a low and fertile bottom, of one fourth of a mile in width, which said bottom is in cultivation; that in the year 1851, the defendant entered upon and constructed her railroad, over and across said lands, from east to west, crossing said creek at right angles, about the middle of said lands; that the original construction of said road across said bottom and creek was such as not to materially interfere with the flow of said water in its natural channel; that in times of freshets it spread over said bottom, and passed off without any damage; that said works across said bottom and creek so remained until the year 1855, when the defendant, not regarding the rights of the plaintiff, wrongfully and unnecessarily changed the construction of her said road over and across said land and stream, in such a manner as to cause great and unnecessary injury to the lands of plaintiff; that she has, in such wrongful manner, unnecessarily obstructed the natural flow of said stream, by erecting an embankment across said bottom to the height of twenty-five feet, connecting and adjoining up to the abutments of said bridge there erected, of sixty-six feet in width, through which only, the water of said stream is allowed to pass, and by wrongfully and unnecessarily filling up the bed of said

stream at above and below where the water passes between said abutments, to the height of three feet above its natural bed; that, owing to the construction of said embankment, and the filling of the bed of said stream, the water in times of freshets, which occur frequently, cannot pass between said abutments, as it passed off before the construction of the same, gathering a head above said embankment of fifteen feet in depth, and thereby, for the last six years, has destroyed crops of the plaintiff to the value of twenty-five hundred dollars, and injured fences and washed away rails to the value of five hundred dollars; that, owing to the accumulation of water above said embankments as aforesaid, it is wrongfully forced between said abutments with great velocity, and is thereby unnecessarily confined in a narrow channel, and for a long distance, to wit, a half mile, runs through said bottom with much greater rapidity than it would naturally flow, and thereby greatly washes away and injures the soil of said plaintiff, and cuts new channels therein, and washes away the surface, and crops, and fences of plaintiff, and has done so for the last six years, to said plaintiff's damage five thousand dollars. Plaintiff further states, that during the last six years, the defendant has wrongfully and unlawfully thrown large quantities of stones, timber, and other rubbish, on the lands of the plaintiff, and into said stream, which have floated and lodged there on the lands of the plaintiff, where they have formed drifts and obstructions, and caused said creek to wash away the soil of plaintiff, and cut new channels, all of which was to plaintiff's damage five thousand dollars; demanding judgment for said sum.

A demurrer was overruled to this paragraph, and the appellant excepted. This presents the first question in the case.

The answer, as finally amended and sustained by the court, admits that the plaintiff owns the lands; that the defendant constructed and owns the railroad; that, in the original construction thereof, Croy's creek, on the plaintiff's lands, was spanned by trestle work, as also the adjoining

lands out to the high ground; that this wooden trestle work, or construction, was temporary, and to remain until the company could procure the materials for a more permanent construction of the work; that in 1855 she did make said permanent improvement, by putting in stone abutments for the bridge, of the width of sixty-six feet, and filling up the trestle work with earth, so as to make the road more secure for the transportation of freight and passengers; and that the same was done in a skilful and careful manner, without unnecessary damage to the owner; and the plaintiff has his remedy for all damage, if any, under the laws of the State for the assessment of damages in such case made and provided; concluding with a denial of all matters not confessed or confessed and avoided.

Issue was taken on the answer, by the general denial. Trial by jury.

The court charged the jury as follows: "There is no controversy in this suit about the right of the defendant to construct her road over the land, nor about whether in so doing, she, for the purpose of the corporation, carefully, skilfully, and scientifically did so. The questions for the jury to determine are, did the defendant, by the manner in which she built or repaired the road, wrongfully and unnecessarily injure the plaintiff's land, or crops, or fences, or injure him by the timbers floating on to his land? If the jury believe the plaintiff has been so injured, they should find for the plaintiff, and assess his damages for any such injury he may have sustained within six years prior to the 6th day of July, 1866, but for no injury sustained since July 6th, 1866. If the jury do not believe plaintiff has sustained any such damages within the period aforesaid, they should find for the defendant.

"If the jury believe, from the evidence, that the said lands of the plaintiff were overflowed and submurged to a greater extent and depth, and the water longer detained thereon, because of the erection and maintenance of the abutments and embankments named, and if they further

believe, from the evidence, that the defendant could reasonably have avoided the overflow of said lands and detention of said waters to so great an extent, by constructing said work in a different manner; then, as to that point, the plaintiff should recover.

"If the jury find for the plaintiff on the foregoing instructions, the rule by which you should be governed in the assessment of damages is this: he is entitled to the actual damage, caused by said obstructions, which he has sustained to his rights in said lands for six years prior to July 6th, 1866.

"If you believe, from the evidence, that the defendant, by the manner of constructing the abutments and fills complained of, has *unnecessarily* caused the waters of Croy's creek to injure the lands or crops of plaintiff, you should find for the plaintiff, and assess his damages accordingly.

"If, by reason of said abutments and fills, the waters of said stream are, during ordinary freshets, obstructed in their passage, and dammed above said embankments much more than they were before said abutments and fills were made, and said water has to go through a passage but sixty-six feet wide, which greatly accelerates the current below said embankment, and thereby causes serious damage to plaintiff's crops and lands, and said injuries could have been prevented at a reasonable cost, by defendant making a wider passage for the said stream, and the road so constructed would have been as safe and permanent; then the said obstructions were unnecessary, and the plaintiff should recover.

"If you find, from the evidence, that defendant, by her employees or servants, threw parts of old structures or timbers on the lands of the plaintiff, at a place or places where the same would be likely to be floated into said stream, and that any of said timber or rubbish was washed into the channel and obstructed said stream on plaintiff's land, to his damage, you should find for him the amount of damage so sustained by him.

"If the jury find that the works of which plaintiff complains were an obstruction to the free use of his property, so as essentially to interfere with the enjoyment of it, and that said works might have been constructed so as to render the said road safe and permanent, without injury to the plaintiff; then you should find for the plaintiff, and assess his damages accordingly. This instruction is applicable only to so much of defendant's works as may unnecessarily damage the plaintiff's property, if any such there are, and not to others that are of a different character."

To the giving of these instructions the appellant severally excepted.

The defendant asked instructions which were refused by the court, as follows: "1. The plaintiff alleges that the defendant wrongfully and unnecessarily changed the construction of her road over and across the lands of the plaintiff, and Croy's creek, in such a manner as to cause great and unnecessary injury to the lands of the plaintiff, and the defendant denies this allegation, and this is the issue that you are to try and determine.

"2. If you find from the evidence, that the defendant is a corporation organized under the laws of this State, that the defendant by virtue of her charter and for the purpose of constructing her road, entered upon the lands of plaintiff and condemned his land for her road bed, and constructed her road over, through, and across the lands of the plaintiff; in such case the plaintiff had the right, at any time within two years thereafter, to claim from the defendant all the damages that he had sustained by reason of the appropriation of his land for the road bed, and all damages done to the use and occupation of his lands not appropriated; and if the plaintiff has failed to claim his damages in conformity with the statute, he cannot recover such damages in this action; and the same rule obtains in reference to any changes or additions that the defendant has made over and on the lands of the plaintiff.

"3. If you find, from the evidence, that the abutments

and embankments constructed by the defendant, on the land in controversy, were necessary and proper, and constructed with care, prudence, and skill; then you must find for the defendant.

"4. If you find, from the evidence, that the embankments and abutments are necessary to the safety of passengers and property passing over said road, and that it was built, constructed, and erected with care, skill, and prudence, not only as to safety of persons and property passing over the road, but for the protection and safety of the property holder; then you must find for the defendant."

To the refusal to give each of these instructions the appellant excepted.

The defendant requested the court to instruct the jury, if they rendered a general verdict, to find specially upon certain question of fact, which the court refused. The interrogatories are as follows:

"Quest. 1. Is the defendant a corporation organized under the laws of this State?

"Quest. 2. Did the defendant, by virtue of her charter, and to make her road, enter upon the lands owned by plaintiff, appropriate his land for her road bed, and construct her road over, through, and across the lands of the plaintiff?

"Quest. 3. When was such appropriation made? and when was defendant's road made through the lands of the plaintiff?

"Quest. 4. What kind of abutments and bridges were first erected? and were they intended to be permanent or temporary?

"Quest. 5. When were the stone abutments made?

"Quest. 6. Were the stone abutments necessary and proper? and were they constructed with care, prudence, and skill?

"Quest. 7. Was there any trestle work on defendant's road east of the abutments on Croy's creek? and if yes, how far did it extend?

"Quest. 8. Was it safe to transport passengers and freight over the said trestle work, on defendant's road?

"Quest. 9. Was the space covered with trestle filled up with earth? and if yes, when?

"Quest. 10. Was it necessary and proper to fill up the space covered with trestle work with earth? and was it filled with care, prudence, and skill?

Quest. 11. Was it necessary, to protect the abutments from the action of the water, that a rip-rap wall should be placed around the base of the abutments, and that the space between the abutments should be paved? and was such work done with care, prudence, and skill?

Quest. 12. Was there any unnecessary obstruction placed on the plaintiff's premises by the defendant, and complained of by plaintiff in this action? and if so, what was it, and when done?"

And in lieu of the above, the court submitted and required answers to the following interrogatories:

"1. Did the railroad company so construct or repair their road as to unnecessarily injure the plaintiff's land, or crops, or fences?

"2. Did the defendant leave timbers and rubbish lying near the road, so as to be floated down Croy's creek, and that the same was floated on the plaintiff's land below the road, and there formed drifts and caused washes, thereby injuring plaintiff's lands or crops?"

The evidence, which is in the record, tends to show that Croy's creek is a small stream of about twenty feet from bank to bank; that the railroad company in constructing a bridge across it, placed the abutments sixty-six feet apart. The testimony is conflicting as to whether this is sufficient to pass the water in times of ordinary freshets. The jury found for the plaintiff. The appellant moved for a new trial, which motion was overruled.

The road in question was constructed under a special charter passed by the legislature before the adoption of the present constitution. The original act was passed January

26th, 1847. This act was amended February 16th, 1848; and again January 13th, 1849. The improvement complained of was made from 1855 to 1857.

The charter as amended provides, that "in all cases when the owner or owners of land or stone necessary for the use and construction of said road shall refuse to relinquish the same to the corporation, or shall refuse to accept a fair compensation therefor, it shall be lawful for the corporation by their president, or by any superintendent, agent, or engineer employed by them, to enter upon and take possession and use the same, avoiding in all cases unnecessary damage or injury to the owners or proprietors." The act provides the mode for the assessment and payment of the damages to the land-owner.

So far as any damage was likely to result to the land-owner from a proper construction of the road, the remedy was by the mode pointed out by the statute.

The company had an undoubted right to construct her road with reference to its fitness for the purpose for which it was to be used; she had a right to look to the safety of persons and property passing over it. In making a good road, she was to avoid "unnecessary damage or injury to the owners or proprietors."

We hold that the fourth instruction asked by the appellant is a correct exposition of the law, so far as it was applicable to the issues, but the court committed no error in refusing it, for the reason that it was too general.

It is claimed that these interrogatories all answered in favor of the railroad company would not be sufficient to control the general finding.

This turns upon the construction to be given to words used in the interrogatories, "necessary and proper." If these words meant "necessary and proper" in reference, not only to "the safety of passengers and property passing over the road," but also "for the protection and safety of the property holder," then the special finding would have covered the issues; and if against the general finding would have

been controlling. The interrogatories must be construed to apply to the issues and the law of the case.

The jury ought to have been plainly charged, so far as the injury from overflowing the lands of the plaintiff by the construction of the embankment and abutments was concerned, that if they found, from the evidence, that the embankments and abutments were necessary to the safety of passengers and property passing over said road, and that it was built, constructed, and erected, with care, skill, and prudence, not only as to safety of persons and property passing over the road, but also for the protection and safety of the property holder, then the finding on that issue should be for the defendant.

With such a charge, the answer to the interrogatories would have covered the entire case.

The court committed no error in overruling the demurrer to the second paragraph of the complaint.

The 4th, 5th, 6th, 7th, 8th, 9th, 10th, and 11th interrogatories were within the issues, and were controlling in the case, and ought to have been given to the jury.

For this error the court below ought to have granted a new trial.

Judgment reversed, with costs. Cause remanded, with directions to grant a new trial, and for further proceedings.

D. E. Williamson, *A. Daggy*, and *S. H. Buskirk*, for appellant.

S. Claypool, *W. Mack*, and *J. M. Hanna*, for appellee.

NOTE.—This opinion was filed in the November term, 1869; and a petition for a rehearing was overruled in the May term, 1870.

FERITER *v.* THE STATE.

83 283
158 698

CRIMINAL LAW.—*Larceny.*—*Evidence.*—*Public Taking.*—In a prosecution for larceny, whether proof that the taking was done openly, in presence of the owner of the property taken, in the day time, and not by robbery, is or is

not important evidence of the fact that the taking was not felonious, depends on all the circumstances of the case.

SAME.—*Instructions to Jury.—Written and Oral.*—Where, on the trial of a criminal action, the court is requested by the defendant, at the proper time, to put its instructions to the jury in writing, none of the instructions may be given orally.

SAME.—*Arraignment.—Waiver.*—Where, in a criminal action, the defendant's counsel, in the presence of the defendant, in response to an inquiry made by the court, stated that the plea would be not guilty, and thereupon proceeded to trial;

Held, that there was a waiver of formal arraignment.

APPEAL from the Allen Criminal Circuit Court.

FRAZER, J.—The appellant was indicted for larceny. The record shows a plea of not guilty upon a formal arraignment, but it appears also, by bill of exceptions, that there was no formal arraignment, and no express waiver thereof; that in the presence of the defendant, in response to an inquiry by the court, his counsel stated that the plea would be "not guilty." The court was at the proper time requested by the defendant's counsel to put its instructions to the jury in writing, but the judge, over objection, nevertheless gave the jury some instructions and explanations orally. The court was also asked in writing to instruct the jury as follows: "If the jury believe from the evidence that the taking of the overcoat was done in the owner's presence, openly (and not by robbery), in the day time, these circumstances are pregnant evidence that the taking was without a felonious intent, and therefore not larceny, but a mere trespass."

This was refused, but instead thereof the court told the jury, that the facts alluded to, if found, would be circumstances which the jury must consider in determining whether or not the taking was with felonious intent.

We do not think that the instruction as asked is a correct proposition, though copied from a text book. It is our opinion that publicity in the taking is not, in all cases, either strong or "pregnant" evidence that the taking was not with felonious intent. Suppose that the defendant, intending to keep the coat without pretense of right, had falsely

stated to the owner that he wished to try on the coat to ascertain its fit, and thereby had got possesion of it, and then ran away with it; would it be pretended that the public manner of the taking would forcibly repel the idea of felonious intent? The evidence not being before us, we cannot say that such were not the circumstances of the taking in this very case. Indeed, we cannot know that there was any evidence before the jury tending to show a public taking at all; and it is possible, therefore, that the instruction was correctly refused because it was not applicable to the evidence. At any rate, the instruction given by the court goes as far as the law warrants; and it depends upon all the circumstances whether a public taking is or is not important evidence of the fact that the taking was not felonious.

But the judgment must be reversed because the court gave oral instructions. The statute has been held to be imperative by various decisions of this court.

The point made about the arraignment was disposed of in *Molihan* v. *The State*, 30 Ind. 266. The formal ceremony of arraignment may be waived. No substantial right of the appellant was affected in the least, and section 160 of the criminal code (2 G. & H. 427) renders it useless to present such a question here.

Reversed and remanded for a new trial. Prisoner to be returned, &c.

L. Newberger, for appellant.

D. E. Williamson, Attorney General, for the State.

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33 285
144 361

The State, on the Relation of Middle Township, Hendricks County, *v.* Parker and Others.

Evidence.—*Order of Proof.*—It is discretionary with the court to admit or

exclude original evidence offered by a plaintiff, the defendant objecting, after the defendant's evidence is closed.

SUIT ON OFFICIAL BOND.—*Township Trustee.—Conversion of Township Funds.* Where a township trustee, acting in good faith as such trustee, made a contract for the township which he was legally authorized to make, and thereby became liable in said official capacity to pay the other contracting party a certain sum of money, and afterwards made such payment in goods, his individual property, or by giving credit on an account due him personally from such other party, by the consent of the latter, who thereupon released the towhship;

Held, that the fact that the trustee retained a corresponding amount of the township funds applicable to that purpose did not constitute a conversion of the funds of the township to his private use, or render him liable therefor in a suit on his official bond.

SAME.—*Costs.*—Where in a suit commenced in the circuit court, or court of common pleas, on the relation of a township, upon the official bond of a township trustee, the plaintiff recovers less than fifty dollars, exclusive of costs, the judgment not having been reduced below fifty dollars by a set-off or counter claim, the relator is required to pay costs.

APPEAL from the Hendricks Common Pleas.

Suit by the appellant on the official bond of the appellee, Parker, as trustee of said township, the breach alleged being, that Parker had appropriated to his own use certain moneys which had come into his hands as such trustee. Answer, the general denial. Trial by jury. Verdict for the appellant for twenty-four dollars. A motion by the appellant for a new trial was overruled, and the appellant excepted. Judgment for the plaintiff for twenty-four dollars, and against the relator for costs.

ELLIOTT, J.—On the trial of the cause, and after the defendants had closed their evidence, the plaintiff offered to prove, by a competent witness, that certain receipts for money, executed by James H. Smock & Co. and others to Parker as township trustee, were not executed at the time they respectively bore date; which evidence was objected to by the defendants and excluded by the court. It is insisted that the court erred in rejecting this evidence. These receipts formed a part of the plaintiff's original evidence; they were not introduced by the defendants, nor did they give any evidence in reference to them. The evidence

offered could not be claimed as rebutting, and was excluded for that reason. It was original evidence, offered after the defendant's evidence was closed. It came too late to be claimed as of right. The court, in its discretion, might have admitted it, but there was no error in its exclusion.

Exceptions were urged to the tenth instruction given by the court to the jury, as follows: "If you find, from the evidence, that the defendant Parker, as trustee, after having received moneys belonging to the plaintiff, falsely and fraudulently reported to the board of commissioners that he had paid out certain sums of money in his hands, when, in fact, such sums of money had not been paid in pursuance of the legal discharge of his duties; or, if you find that, after having made such report, or after his successor was elected and qualified, he converted any money belonging to the plaintiff to his own use, or, which would be the same thing, falsely and fraudulently procured persons to execute receipts for money paid by him for materials and labor done and performed on a certain school house, when, in fact, such money had not been paid out for such purpose; in either case, the plaintiff will be entitled to recover the amount of money converted by the defendant."

The objection urged to the instruction is, that it is not sufficiently broad; that the plaintiff was entitled to recover of the defendants any money belonging to the township, in the hands of Parker, as trustee, and which he had misapplied or converted to his own use, without proving that he acted fraudulently. The instruction given was in favor of the plaintiff, and followed almost the language of two of the breaches in the complaint. It does not cover the entire case made by the pleadings, but it correctly states the law upon the facts contained in the hypothesis, and is entirely consistent with the charges in the complaint. It contains no error.

Another instruction excepted to is as follows: "If the defendant Parker, while in the discharge of the duties of his office as trustee, made, in good faith, contracts which he

had authority to make, and upon which contracts the defendant, in his official capacity as trustee of the township, was to pay certain sums of money, and, by agreement of the contracting parties, they received, in payment on said contracts, goods of the defendant Parker, or took a credit on debts due the defendant, and discharged the township from all further liability on account of such contracts, the mere retaining of the amount so furnished, or debts credited, would not be a conversion of the funds of the township to the use of the defendant."

It was claimed by the plaintiff that Parker, as trustee of the township, had in his hands money belonging to several distinct funds, which he had not accounted for; and it is argued that the instruction, in effect, authorized the application of the whole amount of the funds in the hands of the trustee to one of the purposes for which they were held, and thereby diverted a portion of it from the use to which it was appropriated. We do not so understand the instruction. It contains the simple proposition, that if Parker, while acting as township trustee, made contracts for the township, which he was legally authorized to make, and thereby became liable, as such trustee, to pay to the other contracting parties, certain sums of money, and afterwards made such payments in goods out of his store, or by giving such parties credit on their accounts due him, by their consent, the mere fact that he retained a corresponding amount of the township funds applicable to that purpose, would not constitute a conversion of the funds of the township to his private use, or render him liable therefor in this suit. The instruction does not involve the question as to whether the facts upon which it is hypothecated amounted to a proper payment out of a particular fund, so as to entitle the trustee to a credit therefor, and contains a proper statement of the law arising upon the facts assumed.

The plaintiff recovered a judgment for twenty-four dollars; and the court rendered a judgment against the relator for costs. This was correct. The suit was for a money

demand on contract, and there was no set-off or counter claim pleaded. In such cases, when the action is commenced in the circuit court or court of common pleas, if the plaintiff recover less than fifty dollars, exclusive of costs, he is required to pay costs. 2 G. & H. 227, sec. 397.

It is claimed that the verdict is too small in amount, under the evidence. The evidence is too indefinite, and in too much confusion, to say nothing of the conflict presented on some of the questions involved, to justify us in disturbing the verdict.

The judgment is affirmed, with costs.

C. C. Nave, for the appellant.

Heeg and Another *v.* Weigand and Another.

Principal and Surety.—*Promissory Note.—Consideration.*—Where a promissory note with surety has been given upon an agreement that the payee shall deliver up to the maker another note for the same amount theretofore executed by the same maker with other surety to the same payee, and the payee fails to so deliver up said other note, there is no consideration to support the new note.

Same.—*Additional Securities.*—If such new note be given to indemnify the surety on the old note, the new one becomes an additional security in the hands of the payee, and the surety for whose indemnity it has been given, having paid the debt and received said new note from the payee, may recover thereon against the new surety.

APPEAL from the Franklin Common Pleas.

Suit by the appellants, Heeg and Keisler, against the appellees, Weigand and Schrunk, on a promissory note for four hundred dollars, executed September 13th, 1867, by the appellees to one Roberts, and by him assigned to the appellants, without recourse.

The appellee Schrunk answered separately, in two para-

graphs, the first admitting that he signed the note, but alleging that he signed it only as surety for said Weigand; that it was executed by them in consideration of the delivering up to said Weigand or cancellation of a certain promissory note for four hundred dollars, then held by said Roberts as payee, on which said Weigand was principal and the appellants were sureties; that said Roberts, at the time he received the note sued on, knew that it was executed to him by the appellees for the purpose of obtaining said other note; that both notes were for the same debt; that Roberts refused to receive the note in suit in lieu of said other note, but retained both notes in his possession until, on the 2d of January, 1868, the appellants received from said Roberts said note on which they were sureties, and gave Roberts their joint note for a like amount; that Roberts then assigned to the appellants the note in suit, without recourse on him, for no consideration whatever, and without the knowledge or consent of the appellees.

The second paragraph of the answer of Schrunk is like the first, except the omission of the allegation, in the alternative, as to the cancellation of the note on which the appellants were sureties, and it avers that said joint note executed by the appellants to Roberts was given in lieu of and to lift said note of Weigand, on which they were sureties, which Roberts delivered to them, and then assigned to them the note in suit, without recourse on him, for no consideration, and released them as sureties; and that both said notes of Weigand were for the same debt of four hundred dollars due said Roberts for money loaned by him to said Weigand.

The appellants demurred to each paragraph of the answer of Schrunk; the demurrers were overruled, and the appellants excepted.

To both paragraphs of this answer the appellants replied in three paragraphs, the first of which, the general denial, was afterwards withdrawn.

The second alleged, that the facts concerning the execu-

tion of the note in suit were not as set forth by said answer, but that on the 13th of March, 1867, said Weigand and the appellants executed their note for four hundred dollars, payable to said Roberts in ninety days; that said note was executed for the sole benefit of Weigand, the appellants executing it as sureties for him; that on the 13th of September, 1867, and after said note was due, the appellants, becoming uneasy, and fearing they would have to pay said note, were urging Weigand to pay it, and it was agreed between the appellants and the appellees, that the latter should execute their note to Roberts for four hundred dollars, due ninety days after date, to indemnify and render harmless the appellants on said note executed by them and Weigand; that the note in suit was executed in pursuance of said agreement; that a short time afterwards said Weigand conveyed all the property he had subject to execution, and left the State of Indiana, and the appellants were compelled to pay said note executed to Roberts by them and Weigand.

The third paragraph was like the second, except that it alleged that said conveyance by Weigand of all his property subject to execution, being real estate worth about eight hundred dollars, was made to the appellee Schrunk, to indemnify him on said note, said Schrunk, at the time, agreeing to pay said note.

Schrunk demurred to the second and third paragraphs of the reply; the demurrer was sustained, and the appellants excepted.

RAY, J.—The first and second paragraphs of the answer were good. There was no delivery of the note according to the terms of the contract. There was no consideration to support the instrument. *Armstrong* v. *Cook*, 30 Ind. 22.

The second and third paragraphs of the reply were each sufficient. By the averments, the new note was given to Roberts, the creditor; it became, therefore, by operation of law, an additional security in his hands, and the sure-

ties for whose benefit it was intended, having paid the debt of their principal, were entitled to the advantages of all his securities.

The judgment on demurrer should have held the reply good.

Judgment reversed, with costs.

T. B. Adams and *F. Berry*, for appellants.

H. C. Hanna and *F. S. Swift*, for appellees.

Casad *v.* Davis and Another.

Contract.—*Construction of.*—A. and B. made a written contract whereby the former agreed to let to the latter, for a certain period, the use of sufficient water to run a saw-mill, at a stipulated rental, which B. agreed to pay, A. reserving to his own use the surplus water, and, in consideration of the letting, B. also covenanted "to deepen the race at the saw-mill to bring it to the depth as it is in the head-gate at said race, with a gradual descent to the flume of said mill, and not to be less at the bottom of said race than" a certain number of feet. The contract, in a subsequent part thereof, contained a stipulation that B. was to have said race to use to keep his saw-logs in; and recited that it was also understood that he "can make the said race wider and deeper if he sees proper."

Held, that under these provisions construed together without extraneous circumstances, the lessee was bound to deepen and widen the race to a certain extent specified, and had the privilege of making it still deeper and wider if he wished to do so.

APPEAL from the White Circuit Court.

Frazer, J.—This was a suit by the appellant against the appellees to recover damages for their alleged failure to deepen and widen a certain mill-race according to contract. The whole case before us depends upon the construction to be given to a written instrument between the appellees and the grantors of the appellant. It was an agreement *inter partes*, whereby the appellant's grantors let to the appellees for eight years, with a privilege of renewal, the use of suf-

ficient water to run a saw-mill at a stipulated rental, payable semi-annually, reserving to their own use the surplus water. The appellees agreed to pay the rental, and, in consideration of the letting, they likewise covenanted expressly "to deepen the race at the saw-mill, to bring it to the depth as it is in the head-gate at said race, with a gradual descent to the flume of said mill, and not to be less at the bottom of said race than 15½ feet." Several stipulations then follow, and afterwards is found this clause: "the said Davis and Hughes to have the said race to use to keep their saw-logs in; it is also understood that *they can make the said race wider and deeper if they see proper.*"

Were the lessees bound to deepen and widen the race at all, or were they merely at liberty to do so?

It is a sensible rule of construction, that such a meaning should, if possible, be put upon the various parts and clauses of a contract as will enable all to stand. The office of construction is to ascertain the intention of the parties, and it is not consistent with general experience to suppose that men have invented a clause which is plain in its expression, and then another intended to destroy the whole effect of the first. So, if the various parts can fairly be reconciled, they should be. This is easy in the present case. As we understand the contract, the lessees were bound to deepen and widen the race to a certain extent specified, and had the privilege to make it still deeper and wider if they wished to do so. In the absence of extraneous circumstances, in the light of which a different meaning might possibly appear (and there were none here), this seems to us to be the fair construction of this instrument.

Reversed, with costs; cause remanded for a new trial.

S. A. Huff, *B. W. Langdon*, and *D. Turpie*, for appellant.

A. Reynolds, *S. E. Perkins*, and *S. E. Perkins, Jr.*, for appellees.

NAVE *v* WILSON, Administrator.

PRACTICE.—*Harmless Error.*—*Demurrer.*—A demurrer to a special paragraph of reply directed to an entire answer, as to one paragraph of which said paragraph of reply was bad, was overruled. On the trial, no evidence was offered in support of the answer, to all the paragraphs of which the general denial was pleaded.

Held, that the error in overruling said demurrer was not available to the defendant.

DECEDENTS' ESTATES.—*Set-Off.*—*Another Action Pending.*—A judgment for costs against a decedent's estate, to enforce which a suit by the judgment-plaintiff against the administrator upon his bond is pending and undetermined, cannot be set up as a set-off in a suit by said administrator against said judgment-plaintiff upon a note executed by the latter to the decedent.

SAME.—*Res Judicata.*—Where an account has been filed as a claim against a decedent's estate, and final judgment on the merits of the cause has been rendered, such judgment, remaining in force, is a bar against said account as a set-off in a suit by the administrator of said estate against the claimant upon a note executed by the latter to said decedent.

APPEAL from the Hendricks Circuit Court.

Suit by Wilson, administrator of the estate of David Matlock, deceased, against the appellant, on a promissory note for eight hundred and eighty-nine dollars and seventy cents, executed by the appellant to said Matlock.

The appellant answered in four paragraphs. The first alleges the execution of the note through mistake as to the amount; that it should have been for five hundred and seventy-five dollars; and, by way of set-off, that said Matlock, at the date of his death, was indebted, and his estate is still indebted, to the defendant, in the sum of five hundred and eighty dollars, a bill of particulars of which is filed.

The second paragraph alleges, that the note was executed, with two others, for the purchase-money of certain land conveyed by said Matlock to the appellant for a certain sum, which was the entire indebtedness of the defendant to said Matlock at the time, the amounts for which said two other notes were executed being specified; and that the note in suit was executed by mistake for eight hundred and eighty-nine dollars and seventy cents, when it should only have been made for five hundred and seventy-five dollars, the

difference between the amount of said two other notes and the entire purchase-money of said land. And the defendant offers to set off against the note in suit an account for services as attorney, amounting to five hundred and eighty dollars, and demands judgment for the excess.

The third paragraph of the answer alleges, that said David Matlock, deceased, before his death, sold and delivered the note sued on to his daughter, Sarah Matlock; and that said David, at the time of his death, had no claim or interest in said note.

The fourth paragraph alleges, that said David Matlock at the date of his death was indebted, and the estate of said Matlock at the commencement of this suit was and still is indebted, to appellant, in the sum of five hundred and eighty dollars, upon an account for work and labor done by the appellant and one John Witherow, as attorneys, in bringing, prosecuting, and defending divers suits in the courts of this State, upon the promise and agreement of Matlock to pay for said services where the Danville and White Lick Plank Road Company was a party to such suits; and that Witherow assigned to appellant his interest in said accounts for such services before the death of Matlock; and that the estate of David Matlock was further indebted to appellant in the sum of one hundred and eighty-nine dollars and fifty-six cents upon a judgment recovered in the Hendricks Circuit Court, on the 8th day of April, 1867, in a suit therein, wherein appellee, administrator, was plaintiff, and appellant, sued with others, was defendant; a transcript of which judgment, so recovered, was made part of said answer; and appellant offered to set off said account and judgment against any sum that might be found to be due appellee; and he demanded judgment for the excess.

Reply in four paragraphs:

First, general denial of the whole answer.

Second, that said account for five hundred and eighty dollars, for fees, set forth in the answer, had been fully adjudicated in a case of claim by the appellant against the

estate of said Matlock, deceased, in the court of common pleas of Hendricks county, a transcript of which was filed with the reply.

The third paragraph was a reply to so much of the answer as alleged the ownership of the note to be in Sarah Matlock. It admitted that said note was not inventoried by the administrator, because it had not come to his hands at the time of making the inventory, and alleged, that for a long time plaintiff understood that, by a contract between said David and the defendant, said note was to be paid by the defendant's conveying certain land to said decedent or his order; to enforce which contract, plaintiff had instituted a suit against said Nave and others, which remained pending until within the last twelve months; that said note was delivered to said Sarah by said David, her father, as an advancement, but that, owing to the failure of the defendant to comply with his agreement to convey said real estate, and the numerous and large debts of said estate, the plaintiff demanded said note of said Sarah, for the payment of the liabilities of said estate, and it was returned to him for that purpose.

The fourth paragraph was a reply to so much of the answer as sought to set off said judgment for one hundred and eighty-nine dollars and fifty-six cents; and it alleged that there was a suit then pending and undetermined, in the court of common pleas of Hendricks county, for the same identical judgment, a transcript of which suit was filed with the reply, said suit being an action by the appellant against the appellee on his bond as administrator.

Demurrers to these replies were overruled, and the appellant excepted. The cause was tried by the court. Finding for the plaintiff for the full amount of the note and interest. Motion for a new trial overruled; and judgment on the finding.

ELLIOTT, J.—The first question to which our attention is called in the case arises upon the ruling of the court in

overruling the demurrer to the second paragraph of the reply. That paragraph assumes to reply to the whole answer, but it fails to do so. The third paragraph of the answer alleges, that Matlock, the intestate, before his death, sold, transferred, and delivered the note in suit, for a valuable consideration, to one Sarah Matlock; that the intestate, at the time of his death, had no interest whatever therein; and that the plaintiff, as administrator of the decedent, had no right of action on said note. And the second paragraph of the reply neither denies nor confesses and avoids the matters so alleged in the third paragraph of the answer. The reply is therefore bad. But the judgment should not be reversed for that error. The first paragraph of the reply was a denial of the whole answer, and put in issue the matters alleged in the third paragraph of the answer, and threw upon the appellant the burden of proof; but no evidence whatever was adduced to sustain the allegations of the answer. The error was merely technical. Issues were properly made on all the paragraphs of the answer, and the appellant could not have been injured or prejudiced in his rights by the error of the court in the ruling on the demurrer.

A question is made as to the sufficiency of the fourth paragraph of the reply. We think it was good.

The court, to which the cause was submitted for trial, found for the appellee the amount of the note and interest; and it is claimed that the finding was excessive, from the evidence. This claim is, in part, based on the paragraph of the answer alleging a mistake made in drawing the note, by which it was made for too large a sum. The evidence fails to show the consideration for which the note was given. It was drawn by the appellant himself, and the evidence does not show that there was any error in the amount; and, in the absence of such proof, the amount named in the note must be presumed to be correct. But it is further urged that the appellant should have been allowed the amount claimed as a set-off on the account set up for services, &c.

The evidence, however, shows that the appellant had previously filed the same account as a claim against the estate of Matlock, the intestate, in the court of common pleas of Hendricks county; that upon the refusal of the administrator to allow it, a trial was had in that court and a final judgment rendered on the merits, which still remains in full force. That judgment was a conclusive bar against the account as a set-off in this case. And as to the judgment for costs against the estate, claimed by the appellant as a set-off, the evidence shows that at the time of filing the answer, and of the trial in this case, the appellant had another action pending for the same cause, which precluded him from setting it up as a set-off in this suit. We think the evidence sustains the finding of the court, and the judgment should be affirmed.

Judgment affirmed, with costs, and five per cent. damages.

C. C. Nave and *W. A. McKenzie*, for appellant.

L. M. Campbell, for appellee.

The State, on the Relation of Lawrence, *v.* White and Another.

Administrator.—*Suit on Bond.*—Complaint on an administrator's bond by a creditor of the intestate, assigning, first, that the administrator had wholly failed and refused to make and exhibit to the court any account of the condition of his trust; second, that he had received personal assets belonging to the estate amounting to a certain sum, which he had converted to his own use, and had failed and refused to apply the same to the use of the estate and to the payment of the debts of the estate; third, that he had failed and refused to pay the relator a certain sum, being the amount of a judgment recovered by the latter against the estate, though said administrator had had assets in his hands out of which the debt ought to have been paid.

Held, that the making of such exhibit after the commencement of this action could not cure the first breach assigned; but the fact that the administrator had in his hands no assets which could be applied to the payment of the relator's claim, was a good defense to the whole cause of action.

The State, *ex rel.* Lawrence, *v.* White and Another.

APPEAL from the Gibson Common Pleas.

GREGORY, C. J.—The appellant sued the appellees in the court below on an administrator's bond. The relator is a creditor of the intestate. The breaches assigned are: 1. That White (the administrator) has wholly failed and refused to make and exhibit to the court any account of his trust. 2. That he has received personal assets belonging to the estate, amounting, in the aggregate, to one hundred and twenty-three dollars and ten cents, which sum he has converted wholly to his own use, and failed and refused to apply the same to the use of the estate and to the payment of the debts of the estate. 3. That he has wholly failed and refused to pay to the relator the sum of twenty-one dollars and fifteen cents, being the amount of a judgment recovered by the relator against the estate, though the administrator has had assets in his hands, out of which the debt ought to have been paid.

The defendants answered, first, by denial; second, that the defendant White, as administrator of the intestate, received the entire assets of the estate, amounting to one hundred and twenty-three dollars and ten cents; that of the assets one hundred and six dollars and ninety-five cents only had been converted into money, one dollar and sixty five cents of which remains in his hands; that there is yet due the estate sixteen dollars and fifteen cents; that he had fully reported the condition of his trust at the (then) present term of the court, which report had been passed upon and approved; that he has no assets in his hands to pay the relator; that it will require the entire assets of the estate to pay the preferred claims; and that the claim of the relator is not a preferred claim.

The appellant demurred to the second paragraph, which was overruled, and this presents the only question in the case.

It is claimed that this paragraph of the answer is not a good defense to the whole cause of action, and being pleaded as such, the demurrer ought to have been sustained.

It is true, as contended for by the appellant's counsel, that the failure to make an exhibit to the court of the condition of the trust was a breach of the bond, but this could not injure the relator, if the answer was true. Such a breach creates only a *prima facie* liability. The making such exhibit after the suit was commenced did not, of itself, cure the breach. But the fact that there were no assets in the hands of the administrator, out of which to pay the debt of the relator, was a full answer to the whole cause of action.

Judgment affirmed, with costs.

W. Aydelotte, for appellant.

J. E. Phillips, for appellee.

34 300
160 118

Thompson *v.* Eagleton.

Bill of Exceptions.—*Time of Signing.*—Where time beyond the term at which final judgment was rendered has been given, in which to prepare and settle a bill of exceptions, and the bill appears by the judge's certificate thereto to have been presented to him and signed after the expiration of the time so limited, it cannot constitute a part of the record.

Replevin.—*Form of Judgment.*—*Motion for New Trial.*—A judgment for the plaintiff in an action of replevin should be in the alternative—that the plaintiff recover the possession of the property, or the value thereof in case a delivery cannot be had—and for damages for the detention; but where the finding contains all the requisites for the rendering of a proper judgment for the plaintiff, and the judgment is not in the form so prescribed, being simply for the value of the property and damages, no question as to the defective form of the judgment is raised by a motion for a new trial assigning for cause, "that the judgment is contrary to law and is not supported by sufficient evidence."

APPEAL from the Marshall Common Pleas.

Elliott, J.—Suit by Margaret P. Eagleton against Thompson, the appellant, to recover the possession of two horses, harness, and a wagon.

Issues were formed, which were tried by the court. Finding for the plaintiff below, that she was the owner and entitled to the possession of the property described in the complaint, and that the horses were of the value of two hundred and fifty dollars, the harness twenty-five dollars, and the wagon twenty-five dollars; that the plaintiff had possession of the wagon, and that the delivery of the residue could not be awarded, the same not having been found, and assessed the plaintiff's damages at one cent. Judgment for two hundred and seventy-five dollars, the value of the horses and harness, and for one cent damages and costs.

The appellant moved for a new trial, "for the reason that the judgment of the court is contrary to the law, and is not sustained by the evidence;" which was overruled.

The cause was tried at the October term, 1868, and the appellant was allowed until the first day of the next succeeding term of the court "to prepare and settle" his bill of exceptions. No bill of exceptions is found in the record of the cause; but a separate paper was filed, which is certified by the clerk of the same court to be a full and complete copy of the bill of exceptions in said cause, "as the same appears of record on file" in the clerk's office, which appears, by the judge's certificate, to have been presented to him and signed, on the 3d day of March, 1869. This was not within the time limited by the court. The term of the court next succeeding that at which the judgment was rendered commenced on the 1st Monday in February, 1869. It was too late to present the bill of exceptions to the judge for his signature afterwards. *Vanness* v. *Bradley*, 29 Ind. 388; *McElfatrick* v. *Coffroth*, 29 Ind. 37; *Earl* v. *Dresser*, 30 Ind. 11.

The judgment should have been in the alternative, that the appellee recover the possession of the property, or the value thereof in case a delivery could not be had. 2 G. & H. 219, sec. 374; *Bales* v. *Scott*, 26 Ind. 202.

No exception, however, was taken to the judgment in the

court below, and it is not therefore available on error in this court. The question is not presented on a motion for a new trial stating that the judgment is contrary to law and is not sustained by sufficient evidence. The finding of the court contained every requisite for a proper judgment, and hence the error in the judgment was no ground for a new trial.

The objection might have been reached by a motion that the proper judgment be rendered on the finding, or by a direct exception to the judgment in the form in which it was rendered.

The judgment is affirmed, with costs and five per cent. damages.

A. C. Capron and *M. A. O. Packard*, for appellant.

T. S. Cogley, for appellee.

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140 370
140 437
141 558
33 302
149 689

The Indianapolis Piano Manufacturing Company v. First National Bank of Indianapolis.

Pleading.—*Promissory Note.—Harmless Error.*—In a suit on a promissory note, the complaint alleged that the note was indorsed to the plaintiff by the payee, who appeared and answered, and judgment was rendered against him, though his name did not appear in the complaint as a defendant except in the title of the cause.

Held, on demurrer by the maker, that the omission of the name of the payee as a defendant in the body of the complaint, if error, could not avail the maker.

Same.—*Copy of Assignment.*—In a suit on a promissory note by an indorsee, the maker cannot avail himself of the failure of the complaint to set out a copy of the assignment, the fact of the assignment being averred.

Bill of Exceptions.—*Pleading Stricken Out.*—Where a paragraph of a pleading is stricken out, the ruling will not be examined by the Supreme Court if the paragraph be not brought into the record by a bill of exceptions.

Same.—*Motion for New Trial.—Recitals Therein.*—Statements contained in a motion for a new trial as to alleged errors committed by the court will not

be taken as true by the Supreme Court, unless the recitals be shown to be true by a bill of exceptions.

APPEAL from the Marion Civil Circuit Court.

RAY, J.—This action was upon two notes executed by the appellant to the order of J. George Stiltz, and indorsed by parties who were made defendants to the action, and it is also alleged that the payee indorsed the note to the bank. A demurrer was overruled to the complaint.

The appellant objects that no where except in the title of the action does the name of Stiltz appear as a defendant. Stiltz however appeared and answered, and judgment was rendered against him. He does not appeal, and if there were error, it could not avail the appellant. Again, it is said that no copy of the assignment is set out. The fact, however, is averred, and as against the maker the proof of that fact need not be pleaded. The maker of the notes cannot avail itself of any defect in the allegations against the indorsers. The demurrer was correctly overruled.

The defendant filed certain paragraphs of an answer, which, upon interrogatories being filed by appellee and answered by appellant, were stricken out on motion. This action of the court is excepted to; but the answer is not brought into the record by bill of exceptions, and we cannot pass upon the objection. *Fisher* v. *Ewing*, 30 Ind. 130; *Ammerman* v. *Crosby*, 26 Ind. 451; *Oiler* v. *Bodkey*, 17 Ind. 600. The appellant complains of other alleged errors, which it asserts, in the motion for a new trial, were committed by the court; but no bill of exceptions is filed, and we cannot accept the statements contained in the motion for a new trial as true. *McSheely* v. *Bently*, 31 Ind. 235.

Judgment affirmed, with six per cent. damages and costs.

J. Hanna and *F. Knefler*, for appellant.

J. T. Dye and *A. C. Harris*, for appellee.

Crawford *v.* The State.

Criminal Law.—*Keeping Gaming House.—Indictment.—Duplicity.*—An indictment charged, that at, &c., the defendant "unlawfully kept *and suffered* a certain building, room, and tenement to be used for gaming, and then and there unlawfully suffered" A. B., C. D., "and divers other persons to the grand jurors unknown, to play at a certain game commonly called billiards, for money and other articles of value."

Held, that the indictment was not bad for duplicity.

Same.—*Evidence.*—On the trial of such an indictment for keeping a gaming house, the evidence showed that the defendant kept a billiard-room, in which players were charged a certain sum per game for the use of the tables, the loser paying such sum; and a witness testified that he had played a game and lost it, and paid the defendant for the table; that he had seen the defendant in the saloon frequently, and had seen his clerk there; that he saw games played, and that the loser always paid for the table. He could not swear positively that the defendant always knew the terms on which the games were played, but thought he had a good opportunity to know that the loser paid for the table.

Held, that this evidence sufficiently showed that the defendant had knowledge that his tables were used for gaming.

APPEAL from the Grant Circuit Court.

Gregory, C. J.—Indictment against the appellant, charging, that at, &c., he "unlawfully kept *and suffered* a certain building, room, and tenement, to be used for gaming, and then and there unlawfully suffered Michael Beck, James A. Stretch, and divers other persons, to the grand jurors unknown, to play at a certain game commonly called billiards, for money and other articles of value."

The court below overruled a motion to quash; and this is the first alleged error complained of.

It is claimed that the indictment is bad for duplicity.

This question has been settled in this court against the appellant. *Dormer* v. *The State*, 2 Ind. 308; *The State* v. *Slocum*, 8 Blackf. 315.

Plea not guilty; trial by the court; finding guilty; motion for a new trial overruled. It is claimed that the evidence does not sustain the finding.

The testimony tended to prove that the defendant kept

a billiard-room, in which players were charged twenty-five cents a game, for the use of the tables, the loser paying the sum thus charged.

One witness testified as follows: "I played one game and lost it, and paid for the table to Mr. Crawford, the defendant. Have seen the defendant in the saloon frequently, and have seen his clerk there. Saw games played, and the loser always paid the bill for the table. I could not swear positively that the defendant always knew the terms upon which the games were played, but think he had a good opportunity to know that the loser paid for the table."

It is not questioned that this was gaming, but it is urged that there was no evidence that the plaintiff had knowledge of it. We think otherwise. No other question is suggested.

Judgment is affirmed, with costs.

A. Steele and *R. T. St. John*, for appellant.

D. E. Williamson, Attorney General, for the State.

83 305
124 70

Ramsey *v.* Flannagan.

Decedents' Estates.—*Executor De Son Tort.*—*Pleading.*—Complaint alleging that the plaintiff held a note against J. R., for fees as an attorney in a certain case pending in a certain court, said note to become due whenever such suit was decided; that judment had been rendered in said action, and said note was due and unpaid; that subsequent to the rendition of judgment, said J. R. died, and the defendant had wrongfully and unlawfully, and with intent to cheat and defraud the plaintiff, sold certain property of the decedent, and appropriated the proceeds to his own use, amounting to a large sum over and above the amount due on the note.

Held, that the complaint was sufficient to charge the defendant as an executor *de son tort*.

Same.—*Evidence.*—In such action it appeared by the evidence that the defendant, having in his possession a horse belonging to said decedent's estate,

assented to its sale, and that the money derived from the sale was applied to pay a note of the decedent on which the defendant was indorser.

Held, that the proceeds went to the defendant's benefit.

DEPOSITION.—*Certificate.—Oath.*—It is not necessary that the certificate of the officer annexed to a deposition should give the form of the oath administered to the deponent; it is sufficient if it simply states, in the language of the statute, "that the deponent was sworn according to law."

SAME.—*Suppression of.—Best Evidence.*—The fact that a deposition contains an oral statement of a fact which can properly be proved only by record, is not a good cause for the suppression of the entire deposition containing proper proof of other material facts.

SAME.—*Leave to Take.*—The fact that a deposition has been suppressed does not render special leave of the court necessary to the taking of a new deposition of the same deponent.

APPEAL from the Hendricks Common Pleas.

RAY, J.—The appellee sued appellant, charging that Flannagan held a note against one John Ramsey for fees as an attorney in a certain case pending in the Clark Circuit Court, said note to become due whenever such suit was decided; that judgment had been rendered in said action, and said note was due and unpaid; that subsequent to the rendition of judgment, said John Ramsey died, and the appellant, Alexander Ramsey, had wrongfully, and unlawfully, and with intent to cheat and defraud the appellee, sold certain property of the decedent, and appropriated the proceeds to his own use, amounting to a large sum over and above the amount due on the note. Certain answers were filed, which are not abstracted, and demurrers were sustained to them. It is assigned as error that the complaint is insufficient. The statute makes any one who shall unlawfully intermeddle with any of the property of a decedent, chargeable as an executor of his own wrong, and liable to an action by any creditor or person interested in the estate to the extent of the damages occasioned thereby, and requires that he shall account for the full value of the property, with ten per centum thereon. The complaint was plainly sufficient under the statute.

A motion was made to suppress a deposition on the ground, first, that the certificate simply stated that the

deponent was first sworn according to law, and did not give the form of the oath. As the certificate fulfilled the exact requirement of the statute, the court properly overruled the motion for this cause. 2 G. & H. 176, sec. 257; *Welborn* v. *Swain*, 22 Ind. 194. Second, it was objected to the deposition that it contained an oral statement that the cause pending had been decided in the Clark Circuit Court, when it is insisted that the fact could only be proved by the record. But if this position be correct, still, as the deposition contained proof of the contract between the appellee and John Ramsey, the motion could not have been properly sustained to the entire deposition. A former deposition of the same deponent having been taken and suppressed, it was objected that the present deposition was taken without special leave of the court. There is nothing in the objection. When a deposition is suppressed, it is no longer in court, and a new one may be taken as a matter of right.

The evidence shows that appellant, having possession of the horse, assented to its sale for one hundred and eighty dollars, and the money was applied to pay a note of decedent on which appellant was indorser. The proceeds went to his benefit.

The judgment must be affirmed, with ten per cent. damages and costs.

C. C. Nave, for appellant.

J. S. Miller and *W. A. McKenzie*, for appellee.

Gaff and Others *v.* Theis.

33 307
155 586

Corporation.—*Manufacturing Company.—Directors.—Statute Construed.*—Directors of an incorporated manufacturing company are officers, within the meaning of the fifteenth section of the act providing for the incorporation of such companies, 1 G. & H. 427.

Gaff and Others *v.* Theis.

SAME.—*Promissory Note.*—A corporation known as "The Aurora Brewing and Malting Company" executed a note signed "C. C. Kelsey, Ass't Sec'y Aurora Brewing and Malting Company."

Held, that this was the note of the corporation, and not that of C. C. Kelsey personally.

APPEAL from the Dearborn Circuit Court.

FRAZER, J.—This was a suit against the appellants, who were the president and directors of an incorporated manufacturing company, known as "The Aurora Brewing and Malting Company," to recover from them personally an indebtedness due to the plaintiff from the corporation by a note signed "C. C. Kelsey, Ass't Sec'y Aurora Brewing and Malting Company," under the provision of the fifteenth section of the act providing for the incorporation of such companies, 1 G. & H. 427.

The complaint made a case fully within the meaning of the statute, and there was therefore no error in overruling a demurrer to it. It is argued that directors are not officers within the meaning of the act imposing the liability, but an attentive reading of it seems to us to be very convincing that this position is not correct. Though penal statutes should be strictly construed, yet such construction cannot be pushed to the extent of disregarding the plain letter and spirit of the act.

Then it is argued that the note was not the note of the corporation, though expressly alleged (and distinctly proved) to be such; but that upon its face it appeared to be the note of C. C. Kelsey, and that the superadded words, "Ass't Sec'y Aurora Brewing and Malting Company," were merely a description of the person. A party may, we suppose, execute a note by any name, other than his own, and yet be bound by it, and this must apply as well to a corporation as to a natural person. We perceive no error in overruling the demurrer to the complaint, nor, indeed, in any of the proceedings.

Affirmed, with ten per cent. damages and costs.

D. S. Major and *O. B. Liddell*, for appellants.

HYATT *v.* HYATT.

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145 59

ADJOURNED TERM.—*Waiver.*—After a court of common pleas had made an order that an adjourned term of said court should be held for the purpose of completing the probate business and any other business properly connected with the settlement of decedents' estates and guardianships, and before the time fixed for said adjourned term, the papers in a suit for a divorce were filed in said court on a change of venue, and the parties appeared at said adjourned term and waived all irregularities and consented to go to trial, whereupon the cause was tried at said adjourned term.

Held, that the court had power to try the cause.

APPOINTMENT OF JUDGE.—*Court of Common Pleas.*—Where the judge who tries a cause in the court of common pleas has been called to the bench by special appointment of the judge of said court, and no objection is made to him in said court, an objection to him cannot be raised in the Supreme Court.

DIVORCE.—*Alimony.*—*Supreme Court.*—*Modification of Judgment.*—A husband was granted a divorce for cruel treatment; the wife was granted the custody of a child five years of age, the only issue of the marriage, until it should be eleven years old and until further order, and an allowance of two thousand dollars for alimony. Upon the evidence, showing that the husband's treatment of the wife had been more cruel than the wife's treatment of the husband; that his real estate was worth thirty thousand dollars and his personal property thirty-six hundred dollars; that she had no separate property; that when he, a widower with five children, married her, she was a stout, healthy, young woman, but her constitution had been broken and her health enfeebled; the Supreme Court ordered the court below to so modify its decree as to allow the wife five thousand dollars in six equal semi-annual instalments, with interest, the first instalment to be paid within ten days after rendition of the judgment, and two hundred dollars annually till the child should reach the age of eleven years, for its support and education, the first payment to be made within ten days after rendition of the decree. (On petition for a rehearing, the members of the Supreme Court having been changed in the meantime, they were equally divided upon the question of the power of this court, in such a case as this, to direct what judgment shall be entered by the court below.)

APPEAL from the Knox Common Pleas.

GREGORY, C. J.—Complaint by a husband (the appellee) against his wife (the appellant) for divorce. The defendant answered, denying the allegations of misconduct charged against her. The appellant also filed her cross complaint for divorce, alimony, and the custody of her infant child.

The plaintiff answered the cross complaint by a denial of the charges made against him of misconduct. Trial by the court. The bill of exceptions, which must govern, states that the court found that the plaintiff was entitled to a divorce; that the defendant was entitled to the care and custody of her infant son and to the sum of two thousand dollars alimony.

The appellant moved for a new trial, first, because the finding was contrary to law and the evidence; second, because the court erred in assessing the amount of alimony, the same being too small. The court overruled the motion and rendered a final decree of divorce, for the alimony, and for the custody of the child, in accordance with the finding.

This suit was originally commenced in the Daviess Common Pleas; the venue was changed to the court below. On the 16th of May, 1868, the Knox Common Pleas made an order, that an adjourned term of the court be held on the 20th of July, for the purpose of completing the probate business and any other business properly connected with the settlement of decedents' estates and guardianships. After this order was made, and before the time fixed for the adjourned term, the papers in the case at bar were filed in the court below. The parties appeared and expressly waived all irregularities and consented to go to trial. It is claimed that the court below had no power to try the case at that adjourned term. And one of the errors assigned is a want of authority in the judge to try the cause and render a valid decree. The court was legally in session; consent gave the power to try.

Judge Patterson, who tried the case, was called to the bench by a special appointment of the judge of the court below. No objection was made to Judge Patterson. It is too late to make any objection now.

The plaintiff and the defendant were married in 1860. The former was at the time a widower, with five children by a previous marriage, four girls and a boy. The eldest was a daughter about twelve, the second, the son, about

ten, the third, a daughter about eight and a half years of age. The youngest was about two years of age,

The parties lived together some seven or eight years. For the first five years, the relations existing between them were agreeable and happy, but for the last two years they were decidedly otherwise. An estrangement took place between them growing out of difficulties between the wife and the two eldest daughters. At the time these difficulties commenced the eldest daughter was some seventeen years of age, the second some fourteen. The eldest daughter was a witness on the trial; speaking of herself and of her stepmother, the appellant, she said, "when we had difficulties, sometimes the one and sometimes the other was to blame." The second daughter was not herself a witness, but the evidence shows that her conduct towards the defendant was of a very objectionable character. On one occasion, in the presence of her father, and without remonstrance on his part, she called her stepmother, the appellant, "an old bitch." On several other occasions she used personal violence towards her. The husband, the appellee, expressly refused to use his authority to restrain these outbursts of passion and violence. After the estrangement, the conduct of the plaintiff and the defendant towards each other was cold and indifferent; they occupied separate rooms; the appellant on several occasions used opprobrious epithets towards the appellee, and on one or two occasions attempted personal violence. The conduct of the husband towards his wife was cruel and inhuman in the extreme. After using personal violence, by throwing his wife down on a brick pavement by which she was severely injured, he left her to the care of the neighbors, during her illness occasioned by his own ill treatment, refusing to allow her to eat at his table; encouraged the servants and his children to treat her with coldness and contempt; frequently ordered her to leave his house, and on one occasion attempted to eject her by force. If the evidence tends to show that the

wife was in fault, it much more strongly tends to show that the husband was in greater fault.

The appellant, at the time of her marriage, was a stout, healthy, young woman. At the time of the trial, she was broken down in constitution and in feeble health. She had one child by the marriage, a son about five years of age, consigned to her care by the decree of the court until he should arrive at the age of eleven years, and until further order.

The husband was worth, at the lowest estimate of any witness, a little over thirty thousand dollars in real, and thirty-six hundred dollars in personal property, making an aggregate of over thirty-three thousand six hundred dollars. The wife had no separate property of her own. The decree for the divorce in favor of the husband on account of the misconduct of the wife entitles him to the same rights, so far as his real estate is concerned, as her death. 2 G. & H. 353, sec. 20. Here there was an allowance for alimony of a sum less than one-fifteenth of the real estate, in which she had an inchoate right to one-third in fee, as against the heirs, and one-fifth as against creditors (1 G. & H. 294, sec. 17); which right was barred by the decree. It was the duty of the court to make provision for the support and education of the minor child, whose care and custody was awarded to the mother. See 2 G. & H. 353, sec. 21.

The circumstances of the case rendered it just and proper that the alimony should have been five thousand dollars; and there should have been, in addition thereto, a provision for the support and education of the child.

Under the authority of *Conner* v. *Conner*, 29 Ind. 48, this case will be remanded, with directions to modify the decree for alimony, so as to require the payment, by the appellee to the appellant, of the sum of five thousand dollars in gross, and that upon payment thereof being secured by appellee, by the entry of replevin bail, he may pay the same in six semi-annual instalments, of eight hundred and thirty-three dollars and thirty-three and one-third cents, with

interest, the first of which instalments shall be paid within ten days after the rendition below of the judgment directed by this court; and that the appellee be decreed to pay to the appellant the further sum of two hundred dollars annually, the first of which two hundred dollars to be paid within ten days after the rendition in the court below of the decree, and yearly thereafter until said child of the plantiff and defendant shall arrive at the age of eleven years, for the support and education of said child.

Judgment for alimony is reversed, with costs; cause remanded, with directions to modify the decree so as to require the payment by the appellee to the appellant the sum of five thousand dollars as and for alimony, in the manner indicated in this opinion; and also to decree the payment, annually, by the appellee to the appellant, the further sum of two hundred dollars, in the manner indicated above.

ON PETITION FOR A REHEARING.

WORDEN, J.—I cannot agree with the Chief Justice and Judge DOWNEY, in overruling the petition for rehearing in this cause. I think the rehearing should be granted for the following reason.

The record in the cause contains no special finding of the facts whatever, though the evidence is set out.

In the original decision of the cause, this court, on the evidence alone, in conjunction, of course, with the pleadings, determine to raise the alimony allowed the appellant, from two to five thousand dollars. This, I think, under our practice, cannot be done in such case. Before the adoption of our present code, chancery causes were heard and determined in this court upon the weight of evidence, and a decree pronounced upon the merits. *Bennett* v. *Welch*, 15 Ind. 332. But since the code this practice is completely obsolete. By statute, the distinction between actions at law and suits in equity is abolished. In some particulars the code has assimilated the proceedings more closely to

the former chancery practice than the practice at law, as, for example, in reference to parties to the action. But in reference to the particular under consideration, it has been uniformly held that the former law practice prevailed. *Alexander* v. *Frary*, 9 Ind. 481. Under the present practice, if a case comes before this court without the evidence, whether it be a case that would, under the old practice, have been an action at law or a suit in equity, a suit for divorce or to recover the amount of a promissory note, this court will always presume that the verdict or finding was sustained by the evidence, and act accordingly. This universal practice demonstrates that the old chancery practice is not in force in this particular, for under that, if the evidence was not in the record, the decree would be reversed for the want of it. *Bennett* v. *Welch*, *supra*. The functions of this court do not extend to *nisi prius* duties. When it undertakes to determine, from the evidence, how much alimony ought to be allowed, and to direct accordingly, it is performing *nisi prius* duties simply. If this court can, from the evidence, determine and direct how much alimony shall be allowed in a divorce case, why not determine how much damages shall be allowed for the breach of a contract, or for a tort, or in any case whatever, and direct the court below to enter up judgment for the amount? The power to do this in divorce cases implies it in all others, for there is no dividing line distinguishing divorce causes from all others. To be sure, the parties in such case may not be entitled to a jury trial, but that does not affect the principle involved. They are entitled to be tried in the court below, and whether by the court alone, or by the court and a jury, can make no difference. This court may undoubtedly determine, from the evidence, whether the alimony allowed by the court below is too much or too little, just as it may determine, in most other cases, whether the damages assessed are too much or too little; but, having thus determined, I think it can only reverse the judgment and send the cause back to be tried anew.

The statute regulating the practice of this court, in this respect, is as follows:

"When the judgment is reversed, in whole or in part, the Supreme Court shall remand the cause to the court below, with instructions for a new trial, when the justice of the case requires it; but if no new trial is required, with particular instructions relative to the judgment to be rendered, and all modifications thereof." 2 G. & H. 276, sec. 570.

Where the amount of the recovery, whether it be for alimony or damages, is too much or too little, it presents one of the cases in which justice requires a new trial; and I can see no basis on which this court can proceed to reverse the judgment and reassess the amount, and direct the court below to render judgment accordingly, unless it be upon the broad principle that this court can, in all cases, determine from the evidence brought before us what judgment shall be rendered, and direct the court below to enter it up accordingly. This would be equivalent to trying the case *de novo* in this court, and requiring the court below to enter up its decrees.

There is ample scope for the operation of the latter branch of the section above quoted, in reference to instructing the court below relative to the judgment to be rendered; for where the facts are found, either specially by the court, or by special verdict, or by the jury in answer to interrogatories, and probably where the facts are agreed upon, and the judgment below is not such as the facts thus found require, this court will, undoubtedly, having reversed the judgment, remand the cause with instructions to render judgment such as this court thinks should be rendered upon such facts thus found.

In the case of *Conner* v. *Conner*, 29 Ind. 48, the case on which the principal opinion in this cause was based, the facts were specially found.

I am of opinion that this court, having reversed the judgment below because the alimony was insufficient, should

have remanded the cause for a new trial of the question of alimony, instead of proceeding to determine the amount thereof, and therefore that the rehearing should be granted.

BUSKIRK, J.—I concur in the above opinion.

T. R. Cobb, *N. F. Mallott*, *J. C. Denny*, and *G. G. Reily*, for appellant.

J. W. Burton, *A. G. Porter*, *B. Harrison*, and *C. C. Hines*, for appellee.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1870, IN THE FIFTY-FIFTH YEAR OF THE STATE.

TURNER and Others *v.* THE THORNTOWN AND MECHANICSBURG GRAVEL ROAD COMPANY and Another.

TURNPIKE.—*Act of* 1867.—*Construction of.*—The act of March 11th, 1867 (Acts of 1867, p. 167), authorizing plank, macadamized, and gravel road companies to procure assessessments on lands to aid in the construction of their roads, conferred the rights and powers specified in it upon corporations organized after as well as those organized before that act took effect.

SAME.—*Location of Road.*—*What Lands to be Viewed, Listed, and Assessed.*—*Injunction.*—It was necessary under said act cf 1867, before the assessors appointed thereunder could proceed to perform their duties therein prescribed, that the road should be located, by selecting and defining the line on which it was to be constructed; and said assessors were required to view *all* the lands within one mile and a half on either side of said road and within the same distance of either terminus thereof, including those within the corporate limits of towns, and to make and report to the county auditor a list thereof, with the assessment of benefit upon those benefitted. A failure to comply with these requirements rendered the assessment void, and an injunction will lie to prevent its collection.

APPEAL from the Boone Circuit Court.

GREGORY, J.—The appellants filed their complaint in the court below against the gravel road company and the coun-

ty treasurer, to enjoin the collection of an assessment made on the lands of the plaintiffs, under the act of March 11th, 1867, to aid in the constrtuction of the road.

The court sustained a demurrer to the complaint and rendered final judgment against the plaintiffs, from which they appeal.

The company was organized and became a corporation, on the 23d of April, 1867, after the act of March 11th, 1867, took effect. It is urged in argument by appellants' counsel, that the latter act does not confer the rights and powers specified in it upon corporations organized after it took effect.

This point was fully considered in *The Rykers Ridge Turnpike Co.* v. *Scott*, 32 Ind. 37, in which it was held, that these rights and powers were conferred on companies organized after as well as those organized before the passage of the act.

The second, seventh, and eighth objections to the legality of the assessment can be considered together. The second objection is, that at the time of the application to the county board, and at the time of the assessment, the route was not defined with sufficient certainty to enable the assessors to make a complete list of all the lands within the legal bounds.

The seventh objection is, that the company did not, prior to the assessment, make a survey of the line of the proposed road, so that the assessors would know where the line was.

The eighth is, that no survey of the line was exhibited to the county board, so as to define the line and termini, except the description stated in the petition to the board.

The description of the road in the petition to the county board is, "upon the route, *or as near thereto as is most practicable*, being the traveled line of the Thorntown and Mechanicsburg road, from the point where said road intersects the east line of the town of Thorntown, Boone county, Indiana, to where it will meet the Danville and Frankfort state road,

on or near the section line between sections twenty-four and twenty-five, township twenty, north of range one west."

The termini of the road are fixed with reasonable certainty; but between those points there is nothing to indicate the route, the line from which the one and one-half miles are to be measured.

The route is not fixed upon the traveled line of the Thorntown and Mechanicsburg road, but "upon the route, *or as near thereto as is most practicable.*"

Here is a line seven miles long, with nothing to indicate where it is to run, it being a matter entirely within the discretion of the company to fix it afterward, according to its notions of practicability.

The statute confers a well defined duty upon the assessors; it is, to assess the benefits upon the lands, within one and one-half miles of the road; no more, and no less.

This uncertainty renders it impossible for them to perform the duties imposed upon them. They must assess the benefits upon all the lands within the limits.

The first section of the act authorizes the petition to "the board of commissioners of the county or counties through which such proposed road is or may be located;" the second section requires, that the assessors "shall proceed to view all the lands within one and one-half miles of such road, on either side thereof as located." Acts of 1867, p. 167–8, secs. 1, 2.

Whilst it is not necessary that the road should be located before the petition, yet it is necessary before the assessors can proceed to the intelligent discharge of their prescribed duties. Such, to our minds, is the plain reading of the statute. The meaning of the word "located" in this statute is the selecting and defining the line upon which the road is to be constructed.

The fourth, fifth, sixth, and twelfth objections to the assessment can properly be considered together. The fourth objection is, that the assessors did not make any list of the lands within the corporate limits of the town of Thorn-

town, although the whole of said corporate limits were within one and a half miles of the terminus of said road.

The fifth objection is, that the assessors did not assess the benefit that would result from the construction of the road to each of the tracts within the limits prescribed by law; but assessed said benefits as to only a portion of the land within the statutory limits.

The sixth is, that the assessment is partial and unequal, and made so as to exempt lands that would be benefited by the construction of said road, while other lands were assessed far above the actual benefit received.

The twelfth is, that the assessors, did not, prior to making the assessment, or at any other time, view all the lands within the bounds prescribed by the order and notice.

These objections raise, first, the question whether the lands within the corporate limits of the town of Thorntown should be included within the list and viewed and the benefits assessed; and, second, whether all the lands within the prescribed limits must not be viewed and the benefit thereto assessed, to constitute a valid assessment.

The title of the act is, "An act authorizing the assessment of all the lands within one and one-half miles on either side, or within one and one-half miles of the terminus of any plank, macadamized or gravel road," &c.

The first section authorizes the company to apply to the county board to appoint assessors "to assess the amount of benefit to each tract of land within one and one-half miles of such road, on either side thereof, or within the like distance of the terminus thereof."

The second directs that the assessors "shall proceed to view all the lands within one and one-half miles of such road, on either side thereof as located, or within one and one-half miles of the terminus thereof."

The assessment is to be upon lands within a given distance of the "terminus" of the road. The word is used in the singular number, but the rule of construction is stated to be, that "words importing the singular number only, may

be applied to the plural of persons and things." 2 G. & H. 336, sec. 798.

It is clear to our minds, that there is no exemption contemplated; but that all the lands, including those within towns and cities, within the prescribed limits, must be viewed, and a list thereof made, with the assessment of benefit upon those benefited. The report to the county auditor must embrace this list, whether the lands therein described are all benefited or not.

But it is claimed in argument, that all these objections are mere irregularities that do not affect the validity of the assessment, and can only be enquired into on appeal from the assessment.

We do not think so. These objections go to the very foundation of the assessment. Indeed, if the allegations of the complaint are true, and they are admitted by the demurrer, there is no valid assessment against the plaintiffs. A court of equity will enjoin the collection of a *void* tax.

Judgment reversed, with costs; cause remanded, with directions to overrule the demurrer to the complaint, and for further proceedings.

T. A. Hendricks, O. B. Hord, A. W. Hendricks, O. S. Hamilton, and *C. C. Galvin*, for appellants.

A. J. Boone, R. W. Harrison, and *J. M. Butler*, for appellees.

Hardwick, Administrator, *v.* The Danville and North Salem Gravel Road Company and Others.

Turnpike.—*Act of* 1867.—*Assessment.*—*Injunction.*—Where assessors appointed under the act of 1867 (Acts 1867, p. 167) failed to view and list any portion of the lands within the limits prescribed by said statute and to

assess the benefit that would result thereto from a proper construction of the proposed road, the assessment made by them on other lands is invalid, and a suit to enjoin the collection of such an illegal assessment cannot be barred by showing an assessment of the omitted lands after the commencement of such suit.

SAME.—*Report of Assessors.*—A report of assessors appointed under said act to the county auditor commenced thus: "Report of assessments made for construction." It was then ruled in columns, headed, "owners' names," "description of land," "amount of assessment;" under which was a list of names of persons, a description of the land owned by each, and the amount assessed against each tract. It then concluded with an affiadvit subscribed by said assessors, stating, "that the foregoing list of lands and town lots have been examined by us, and the benefit that a gravel road leading from" a town named "to" another town named "would be to the same has been by us assessed, as shown by the foregoing list, correctly, just, and fair, according to the best of our judgment and ability."

Held, in a suit to enjoin the collection of the assessment made by said assessors, that said report was essentially defective.

APPEAL from the Hendricks Circuit Court.

ELLIOTT, J.—This was a suit for an injunction, commenced in November, 1868, by Silas Hardwick, against The Danville and North Salem Gravel Road Company and the Auditor and Treasurer of Hendricks county, to enjoin the collection of an assessment made on lands of the plaintiff for the construction of the gravel road of said company, under the act of March 11th, 1867, Acts of 1867, p. 167.

The principal grounds stated in the complaint for an injunction are, that the assessors appointed by the board of commissioners of the county, to assess the benefit to each tract of land within a mile and a half on either side of the proposed road, and within the same distance of the termini thereof, that will result from a proper construction of the same, did not view all the lands within such bounds, or make a list thereof; and that they did not assess the benefit to all the tracts of land within the prescribed limits, that would result from the construction of the proposed road. A number of tracts of land, which, it is alleged, are within the limits named, are described, and it is averred that by the omissions of said assessors, a much greater burden is im-

posed on the lands assessed, including the plaintiff's, than would be required, if all the lands within said bounds had been listed and viewed, and the benefits to each tract properly assessed, as required by the statute.

Silas Hardwick, the plaintiff, died pending the suit, and Warren Hardwick, as his administrator, was substituted as plaintiff.

The defendants filed an answer in two paragraphs:

First, the general denial. The second is to so much of the complaint as states that all the lands within the prescribed limits were not assessed, and alleges that the eighty acre tract described in the complaint, "is the county poor farm, and not liable to assessment for taxes; that the thirty acres in section thirteen, and ten acres in section three, have been assessed upon the request of the company, on the first of July, 1869; that the twenty acres set forth is a part of the farm of R. C. Russell, and was included in assessment against him, but erroneously described as being in section three, instead of section two, and that the residue described in said complaint are not within one mile and a half of said road, wherefore," &c.

To this paragraph a demurrer was filed, which the court overruled, and the appellant excepted. A reply in denial of the paragraph was then filed. By agreement of the parties, the cause was tried by the court.

Finding and judgment for the defendants. A motion for a new trial was made and overruled.

The first error complained of is the action of the court in overruling the demurrer to the second paragraph of the answer. We think the answer is bad, and the demurrer to it should have been sustained. The statute under which the assessment was made makes it the duty of the assessors "to view *all* the lands within one and one-half miles of such road, on either side thereof, as located, or within one and one-half miles of the terminus thereof," if situated in the county where the assessors have been appointed, and "to make a list of all the lands within such bounds, and to assess

the amount of benefit that will result from the proper construction and maintenance of such proposed road, and report the same to the county auditor in writing, and append thereto their affidavit that the same is correct," &c., and directs that the report shall be kept on file by the auditor, for the examination and inspection of any person concerned. This suit was commenced in November, 1868, and the second paragraph admits that the report made by the assessors did not include *all* the lands within the prescribed limits, and that the omitted tracts were not listed or assessed at the commencement of the suit; but attempts to avoid the effect of the errors and imperfections in the assessors report, by showing that during the pendency of the suit, and but a short time before the trial, the omitted tracts had been assessed. This is not a bar to the suit. An erroneous and illegal assessment had been made and placed on the duplicate. The treasurer was attempting to enforce its collection by a levy on the property of the appellant's intestate, and was only prevented from selling it by the restraining order of the court. The assessment was illegal in its inception, and was not a valid tax on the duplicate. It was illegally placed there, and could not be made valid by an assessment of the omitted lands during the pendency of the suit. The statute authorizes the imposition of onerous burdens on land owners without their consent, in the form of an assessment for a specific, and not a general public purpose, and its provisions should be strictly complied with, to justify proceedings under it. Any other rule would leave a wide door for great abuses.

The refusal of the court to grant a new trial, on the ground that the finding of the court is contrary to the evidence, is also assigned for error.

In this, we think, the court also erred. The report of the appraisers to the county auditor was given in evidence and is before us. It fails in almost every essential requisite in meeting the requirements of the statute. It does not show that the appraisers viewed all of the lands within the

prescribed distance of the proposed road, and it does not purport to contain a *list* of all the lands within such limits. Indeed, there is nothing in it showing that any of the lands, a list of which is given, and the benefits assessed, are within a mile and a half of the proposed road or of its termini, nor does it purport to be an assessment of the benefit that would result to the lands from the construction of the particular road.

It commences thus: "Report of assessments made for construction." It is then ruled in columns, which are headed as follows: "owner's names," "description of land," "amount of assessment;" under which is a list of names, a description of the lands owned by each, and the amount assessed against each tract. It then concludes with an affidavit, subscribed by the appraisers, in which they state, "that the foregoing list of lands and town lots have been examined by us, and the benefit that a gravel road leading from Danville to North Salem would be to the same has been by us assessed, as shown by the foregoing list, correctly, just, and fair, according to the best of our judgment and ability."

The judgment is reversed, with costs, and the cause remanded, with directions to the circuit court to sustain the demurrer to the second paragraph of the answer, and for further proceedings.

C. C. Nave, for appellant.

The New Haven and Fort Wayne Turnpike Company and Others *v.* Bird.

Turnpike.—*Act of* 1867.—*Duty of Assessors.*—*Injunction.*—Assessors appointed under the act of March 11th, 1867 (Acts 1867, p. 167), authorizing plank, macadamized, and gravel road companies to procure assessments on lands, to aid in the construction of their roads, were required to make a list of *all* the lands within one mile and a half on either side of the proposed

road, and within the like distance of either terminus thereof, including those in cities incorporated under the general law for the incorporation of cities, assessing those benefited, and to return said list and assessment to the county auditor. An assessment made without compliance with these requirements is void, and an injunction will lie to prevent its collection.

APEAL from the Allen Circuit Court.

GREGORY, J.—This case comes here on a finding of the facts and the conclusions of law upon them, under section 341 of the code.

This was a proceeding in the court below to enjoin the collection of an assessment made on the lands of the plaintiff to aid in the construction of a gravel road under the act of March 11th, 1867, Acts of 1867, p. 167.

The facts found by the court are substantially as follows:

First. That the plaintiff was the owner of the lot in the city of Fort Wayne, described in the complaint, and was charged on the tax duplicate for the year 1867, with the sum of sixty-seven cents, being one-third of the estimated benefit of the turnpike to said lot, the whole amount being two dollars and one cent; that at the proper time the plaintiff tendered to Monning, the county treasurer, the amount of the other taxes on said property, which the treasurer refused to accept unless the plaintiff would pay the said sixty-seven cents so assessed for the turnpike company.

Second. That the defendant, the New Haven and Fort Wayne Turnpike Company, was duly organized on the 12th of June, 1867, for the purpose of constructing a gravel turnpike road from the city of Fort Wayne, in said county of Allen, to the town of New Haven, in said county, having a subscription of at least eight hundred dollars per mile; that at the June session of the board of commissioners of said county for the year 1867, the said turnpike company applied to said board of commissioners, for the appointment of proper freeholders to assess the benefit which the construction of said road would be to each tract of land within one and a half miles of the road, and within the like distance of the termini thereof; and thereupon the board appointed said assessors, who were duly qualified, and entered

upon their duties. That afterwards, on the 28th of September, 1867, the assessors returned to the auditor's office a list of all the lands within one and a half miles of the road, and within a like distance of either terminus thereof, except five lots in the city of Fort Wayne, and a part of two other lots in said city; the said assessors, having viewed the land within the limits aforesaid (except that which was omitted as aforesaid), assessed the amount of benefit which would result to them by the construction of the road. They assessed nothing, however, upon a number of farms situated upon a strip of land owned by different persons, running nearly the whole length of the road, and of variable width, from one quarter of a mile to a mile, but lying on the opposite side of the Maumee river, from the road in question, most of which is under cultivation, and in the occupancy of persons living thereon. There is no bridge across the Maumee river between Fort Wayne and New Haven, nor is the river fordable much of the year. These lands on the opposite side of the river were duly listed by the assessors, and returned to the auditor's office, but no assessment was made on them, nor was any assessment made on part of the west half of the south-east quarter of section eleven, township thirty, range twelve, about forty acres, but the same was listed and returned as the property of Jesse L. Williams, and lies within the limits aforesaid; nor is any reason returned by the assessors why it was not assessed; nor was any reason assigned why any of the lands returned, but on which no assessment was made, were not assessed. All other lands returned by the assessors, were assessed for the benefits which the construction of the road would be to them, amounting, in the aggregate, to the sum of twenty-four thousand four hundred and twenty dollars; and the auditor, at the proper time, placed one-third of the amount assessed to each tract or lot upon the tax duplicate for the year 1867, which duplicate was duly placed in the hands of the treasurer for collection. The assessment of sixty-seven cents is one-third of the amount assessed upon the lot of the plaintiff as aforesaid.

Third. It is not found that any of the tax payers in whose behalf the plaintiff Bird brought the suit owned any of the property upon which the assessment was made; but it is found that all the lands within the limits of the mile and a half as aforesaid were assessed and charged on the duplicate with the third part of the amount of the supposed benefit thereto, in the names of a great many persons, tax payers, too numerous to make it practicable to bring them all before the court, and that the treasurer was proceeding to collect the same, in the legal manner of collecting taxes generally.

Fourth. It is found that Fort Wayne is a city organized under the general law of the State for the organization of cities.

Fifth. That the sum of six thousand seven hundred and eighty-six dollars and forty-eight cents, part of the said sum of twenty-four thousand four hundred and twenty dollars, the entire assessment, was made upon real estate within the limits of said city of Fort Wayne, which was then a city organized as aforesaid, and that one-third of said sum of six thousand seven hundred and eighty-six dollars and forty-eight cents, was charged upon the tax duplicate for said year 1867, upon the property in said city.

The conclusions of law upon the facts so found are in substance as follows:

First. The omission to list or to assess any tract or tracts of land within the specified limits, would not, under the act of 1867, render the assessment of the plaintiff's property, or that of others similarly situated, invalid, if otherwise legally authorized.

Second. That the assessing of such lands as are within one and a half miles of either end or terminus of the road is authorized.

Third. That such lands as lie within the limits of Fort Wayne are not exempt from assessment under the provisions of the statute in reference to the incorporation of cities, or by any other statute.

Fourth. That the recital in the complaint that the plaintiff sues as well on his own behalf, as on behalf of others similarly situated, requires no affirmative proof on his part. "It is," further says the court, "regarded by this court as being the law upon this subject that the plaintiff Bird is allowed to proceed in this case upon the principle that he is presumed fairly to represent the rights and interests of all others similarly situated, and that, although for the convenient administration of justice they are not required to be directly made parties, yet that all those who, in such case, are similarly situated with the plaintiff, upon such recital or suggestion being made in the complaint, are in one sense, for the purpose of the litigation, deemed, *prima facie*, to be before the court."

Sixth. That the law (Acts 1867, p. 167) is void.

Final judgment was rendered for the appellee enjoining the collection of the assessment. From this judgment the turnpike company appeals.

Several of the conclusions of law were erroneous, but the judgment must, notwithstanding, be affirmed, for the reason that the errors committed do not affect the substantial rights of the appellants. See 2 G. & H. 122, sec. 101.

In *Turner* v. *The Thorntown and Mechanicsburg Gravel Road Co.*, at this term, *ante*, p. 317, it is held, that under the act of March 11th, 1867, the assessors must make a list of all the land in the prescribed limits, including those in towns and cities, assessing those benefited; that this list and assessment must be by them returned to the auditor; that a failure to do this renders the assessment void; and that a court of equity will enjoin the collection of a void tax.

The facts found entitled the appellee to the relief awarded him by the decree of the court below.

Judgment affirmed, with costs.

J. L. Worden, *J. Morris*, and *W. H. Wethers*, for appellants.

J. & W. G. Colerick, *T. A. Hendricks*, *O. B. Hord*, and *A. W. Hendricks*, for appellee.

SEYBERGER *v.* THE CALUMET DRAINING COMPANY.

DRAINING ASSOCIATION.—*Articles of Association.—Statement of Purposes.—Statute Construed.*—In the articles of association of a draining company, organized under the act of 1869 (Acts 1869, Spec. Sess. p. 82), it was stated, that "the object of the association shall be to drain and reclaim the wet and overflowed lands lying along and contiguous to the valley of the Calumet river, commonly known as the Little Calumet, in the northern portions of Lake and Porter counties, in the State of Indiana, by digging, if deemed expedient, a new channel and outlet for the waters of said valley, or a portion thereof, and by digging, excavating, and constructing such other ditches and channels as may seem best adapted to drain, improve, and reclaim said lands."

Held, in a suit by an owner of lands liable to be beneficially affected by the proposed drain, to enjoin said company from proceeding to assess and make a charge upon said lands the amount of benefit they would receive from the construction of said drain, that, viewed in the light of the evidence, this was so distinct a statement of the purposes intended to be accomplished, that all whose lands were liable to be affected by the proposed drain might know the fact therefrom, and therefore fulfilled the requirement of the statute in that regard.

APPEAL from the Lake Circuit Court.

This was a suit against the appellee, a draining association organized under the act of May 22d, 1869 (Acts 1869, Spec. Sess. p. 82), by the appellant, an owner of wet lands liable to be beneficially affected by the proposed drain, to enjoin said company from proceeding to assess and make a charge upon said lands the amount of benefit they would receive from the construction of said drain.

The cause was tried upon an agreed statement of facts. The court found for the appellee, and dismissed the complaint. A motion for a new trial, made by the appellant, was overruled, and the appellant excepted.

FRAZER, J.—We have heretofore held that the articles of association of a company, organized under our laws, to reclaim wet or overflowed lands, must so distinctly state the purposes intended to be accomplished, that all whose lands are liable to be affected by the work may know the fact,

and be able to avail themselves of the right given them by the statute to become members of the association, and thus participate in the management and control of its operations. *West* v. *The Bullskin, &c., Co.*, 32 Ind. 138; *O'Reiley* v. *The Kankakee, &c., Co., id.* 169. It has seemed to us, not only that this is a plain requirement of the letter of our statutes upon the subject, but also absolutely essential to prevent abuses and to secure the beneficial, successful, and just operation of these laws.

The question now presented is, whether this requirement is fulfilled by the articles of association of the appellee, which, upon that subject, are as follows: "The object of the association shall be to drain and reclaim the wet and overflowed lands lying along and contiguous to the valley of the Calumet river, commonly known as the Little Calumet, in the northern portions of Lake and Porter counties, in the State of Indiana, by digging, if deemed expedient, a new channel and outlet for the waters of said valley, or a portion thereof, and by digging, excavating, and constructing such other ditches and channels as may seem best adapted to drain, improve, and reclaim said lands."

The purposes for which the act of 1869 authorizes the incorporation of such companies is the drainage and reclamation of wet lands, and the protection of lands from overflow, and it would undoubtedly be a full compliance with the requirement of the second section, that the purpose of the company shall be stated, to designate by metes and bounds or other particular description the lands which it is intended to drain, reclaim, or protect. Indeed, a more general description of such lands would doubtess be sufficient, if certain enough to determine definitely the lands liable to be affected. We have, in effect, held, in both the cases above cited, that a definite description of a ditch or drain intended to be constructed, with its courses, distances, dimensions and termini would alone be enough; for the reason that from this it could be determined what lands would be affected. In the record before us, there is an agreed state

of facts, setting forth, amongst other things, the topography of the country bordering upon the Little Calumet, in the northern portion of the counties of Lake and Porter. In the light of the facts thus shown, we think that if the articles of association had stopped with the statement that the purpose was "to drain and reclaim the wet and overflowed lands lying along and contiguous to the valley of the Calumet river, commonly known as the Little Calumet, in the northern portions of Lake and Porter counties," it would have been a substantial compliance with the statute, and sufficient. But it is further stated that this is to be accomplished "by digging, *if deemed expedient*, a new channel and outlet for the waters of said valley, *or a portion thereof*, and by digging, excavating, and constructing such other ditches and channels as may seem best adapted to drain, improve, and reclaim said lands." This language, added to that which precedes, declares a further purpose, *i. e.*, to attempt the attainment of the end sought by the construction of a certain work *if deemed expedient*, and by such other ditches and channels as *may seem* best adapted to succeed. This gives rise to whatever doubt may exist concerning the question before us. If it is meant that the company will construct the works mentioned, or not, as it shall finally determine to be expedient, and that it will not attempt to attain the end by other works in case it decides that these are not wise, then the sum of the matter is that its purpose is declared to be to drain the lands or not, as it shall finally judge best. But this construction may be adopted only in case the language will not admit of any other which will be legally effective. The rule is, that an instrument shall, if possible, receive such a construction as will give it effect, such as will not make it a nulity, such as will not lead to absurdity. This rule, thus expressed in different forms, signifying however the same thing, applies in the interpretation of statutes, of contracts, and of all instruments, and is elementary. If the declaration of purpose had been merely to reclaim the lands, without specifying methods, the

company would, under the law, have been at liberty to determine the means which it would employ. Here it goes further than necessary, and makes known its intention to construct a certain work, if it shall so determine, or deem it expedient, and such others as shall seem (that is, as it shall decide to be) adapted to effect the drainage designed. All this is nothing more, according to a reasonable construction of the language, than an express statement of its intention to use that discretion in the choice of means to accomplish its purpose, with which, by law, it would have been clothed if the statement had not been made. This ought not, it seems to us, to be held to vitiate articles of association which are otherwise without fault. It does no hurt—it misleads nobody—and the fact remains that the wet lands along the Little Calumet valley and the wet lands contiguous or adjoining are to be affected. This general description of the lands is sufficient to identify them, so that each owner of any part of them may protect his interests by becoming a member of the company, and thus obtain a voice in the management of the undertaking.

Affirmed, with costs.

J. Bradley, for appellant.

J. B. & W. Niles, for appellee.

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Keicher *v.* The Killbuck Turnpike Company.

Turnpike.—*Right of Way.—Estoppel.—Recovery of Real Estate.*—A proceeding was instituted before a justice of the peace, to condemn the right of way for a turnpike under the act of May 12th, 1852 (1 G. & H. 475, sec 7); in which damages were assessed to the land owner, who appealed to the circuit court. After the appeal was taken, the turnpike company tendered the amount so assessed, and took possession of the land. The circuit court dismissed the *cause*, and rendered judgment for costs.

Held, said judgment of the circuit court remaining in force, not appealed

from, that it estopped the company from showing that the proceeding before the justice was regular, and the land owner was entitled to recover possession of the land.

SAME.—*Appeal.—Circuit Court.—Jurisdiction.*—On such an appeal to the circuit court, that court has jurisdiction to inquire into the entire case, and not merely as to the amount of damages.

APPEAL from the Madison Circuit Court.

GREGORY, J.—Suit by the appellant against the appellee, for the recovery of real property.

Trial by jury; verdict for the defendant; motion for new trial overruled, and final judgment.

It is admitted that the legal title to the land is in the plaintiff, and his right to recover is conceded, unless a certain proceeding had, to condemn the right of way for the appellee's road, divested that right. That proceeding was instituted before a justice of the peace, under the provisions of the act of May 12th, 1852, 1 G. & H. 475, sec. 7.

The damages were assessed to the appellant, from which he appealed to the circuit court. After the appeal was taken, the turnpike company tendered the amount assessed, and took possession of the land in controversy. The circuit court dismissed the case (not the appeal) and rendered judgment for costs. From this judgment no appeal has been taken.

It is claimed, that the assessment and tender of the damages vested in the appellee the right of way, and that it was not divested by the judgment of the circuit court dismissing the case.

We think this position not tenable. The judgment of the circuit court, whilst it remains in full force, unappealed from, is conclusive upon the parties to it, that the proceeding before the justice of the peace was without foundation. The effect of that judgment was to place the parties in the condition they were in before the proceeding was instituted.

It is said in *Jeffries* v. *Maccown*, 30 Ind. 226, that "it is true that an appeal to the Supreme Court only suspends action on the judgment; but in the case at bar, the proceeding before the justice gave the right of entry; the order

of dismissal could not divest that right. It may be that the company would have been estopped by the judgment from showing that the proceeding before the justice was regular, but for the appeal to the Supreme Court." Now, whilst the dismissal did not divest the right of entry, the judgment of the circuit court is final, unappealed from, and the judgment does estop the company from showing that the proceeding was regular.

It is urged, that the only question which the appellant had a right to have tried, on the appeal from the assessment, was the amount of damages; and that by the appeal he waived all others. The statute provides, "that either party may, at their option, appeal the same to the circuit court of the proper county, *as in other cases.*" The fair construction of this provision is, that the case shall stand on appeal in the circuit court as other appeals stand. The circuit court had jurisdiction to inquire into the whole case.

The court below erred in overruling the motion for a new trial.

Judgment reversed, with costs; cause remanded, with directions to grant a new trial, and for further proceedings.

W. R. Pierse, H. D. Thompson, H. Craven, R. Lake, and *R. N. Williams,* for appellant.

M. S. Robinson, J. A. Harrison, J. W. Sansberry, and *E. B. Goodykoontz,* for appellee.

The Bellefontaine Railway Company v. Hunter, Administrator.

Verdict.—*Special Findings of Jury.*—When the special findings of a jury upon particular questions of fact are used to control the general verdict, all the facts to authorize an adverse conclusion should appear by such special answers.

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The Bellefontaine Railway Company *v.* Hunter, Administrator.

EVIDENCE.—*Declaration of Agent or Servant.*—In an action against a railroad company by an administrator, to recover damages for the death of his decedent occasioned by the collision of a locomotive and train of cars and a wagon in which said decedent was crossing the track of the defendant upon a public highway;

Held, that the declarations of a fireman employed on the locomotive at the time of the collision, made upon the arrival of said train, bearing the body of the deceased, at a station one mile from the place of the accident, the train having been stopped at the scene of the accident, and the body having been placed upon it and carried thereon to said station, that the train was running between forty and sixty miles an hour; that he could not tell any difference between the signal and the collision; that the deceased was sitting with his back toward the train; that he did not think the deceased saw or heard the train or knew there was any train in reach of him; that the deceased never moved out of his position till he was struck; that there was no signal, were not admissible in evidence as part of the *res gestæ*.

SAME.—*Presumption as to Improper Evidence.*—Where error has occurred in the admission of improper evidence material to the issue, it will be presumed that it worked injury, unless the contrary affirmatively appear; and the action of the court in overruling a motion for a new trial assigning such error for cause is not presumptive evidence that the error worked no injury.

NEGLIGENCE.—*Railroad.*—No neglect of duty on the part of a railroad company will excuse any person approaching on a highway a crossing of the track of said company from using the senses of sight and hearing, where these may be available; and injury to such person where the use of either of such faculties would have given sufficient warning to enable him to avoid the danger, conclusively proves negligence, and there can be no recovery for such injury, unless the railroad company has been guilty of such conduct as to imply an intent or willingness to cause the injury; and this can be attributed only where the company has notice of the particular emergency in time to avoid the collision by the use of ordinary diligence, the means being at hand. If the injured person had such warnings and opportunities of knowledge as would, with ordinary caution in such circumstances, have saved him from the danger, he will be held to have knowingly contributed to his own injury. The failure of a railroad train to give any signal when nearing a public crossing is not of itself negligence, in this State, unless the peculiar circumstances, the concealment of the train or the like, may render it necessary and proper.

APPEAL from the Marion Common Pleas.

RAY, C. J.—This was a complaint, in two paragraphs, against the appellant, charging in the first, that said corporation carelessly and negligently ran its locomotive and cars over one William M. Hunter, whereby he was instantly

killed, without fault or negligence on his part. In the second paragraph it was alleged, in addition to the former averments, that the appellant did recklessly, wantonly, and with gross carelessness, run the cars against, upon, and over the said Hunter, while he was in the lawful act, without fault or negligence, of crossing over said defendant's road, along and upon a public highway, leading over and across said appellant's road; that said appellant did not ring the bell, or blow the whistle, or give any signal of approach, whereby said Hunter might have been warned and informed of the near and rapid approach of said train, and his life thereby saved.

The answer was in denial. Trial by jury, and finding for the appellee, for thirty-five hundred dollars; and with the general verdict certain interrogatories were submitted and answered, as follows: On behalf of the appellee it was asked,

"1. Was not William H. Hunter killed on the afternoon of August 30th, 1867, by being run against by a locomotive and train of cars of defendant, at the point where the county road, leading north and south, crosses the track of the defendant's railroad at Minnowa Station, and while he, said Hunter, was crossing said railroad track along said county road with a wagon and team of horses which he was driving at the time?" Ans. "Yes."

"2. Did defendant's agents, running and having charge of said train of cars, give any signal of the approach of said train to said crossing of said county road?" Ans. "No."

"3. Was not said train running at a great speed when it approached the point where said county road crosses the railroad track of the defendant?" Ans. "Yes."

"5. Was not the rate of speed at which said locomotive and train were running, at the time it was approaching said crossing, from forty to sixty miles an hour? If not, what was the rate of speed? Ans. "No. From thirty to forty miles an hour."

"6. Was the rate of speed at which said locomotive and train were being run when approaching said crossing slackened before reaching the crossing?" Ans. "No."

"7. Was the bell or whistle of the engine of said train rung or blown before said Hunter was struck by the said train?" Ans. "No."

"8. Did not the sound of the whistle and that of the crash of the collision of the train and wagon in which said Hunter was occur at the same time?" Ans. "Yes."

"9. Was not said county road, crossing said railroad track of the defendant, much used for travel?" Ans. "Yes."

"11. Did not the death of William H. Hunter result from the unreasonable rate of speed with which said train of cars approached the crossing of the county road and the railroad track over which he was passing, and from the failure of the engineer of the train to keep the proper look-out ahead of the train, and his failure to seasonably give notice of the approach of the train to the crossing, by the signal of blowing the whistle and ringing the bell?" Ans. "Yes."

And the jury returned the following answers to the interrogatories propounded by the court at the instance of the appellant:

"1. Did not William Hunter know, when he left Lanesville, on the 30th of August, 1867, that the train of cars would be due at that place in a few minutes?" Ans. "Yes."

"2. Could not the noise of the approaching train be distinctly heard on the road leading from the gravel road to Minnowa crossing?" Ans. "Yes."

"3. Could not the approaching train have been plainly seen by a person on the highway at a point thirty feet south of the railroad track?" Ans. "Yes."

"4. Was not Hunter in the full possession of the senses of sight and hearing?" Ans. "Yes."

"5. Did not Hunter, after he was notified of the approach of the train by Freeman, and when he knew the train was

due, and when he could have both seen and heard the train, take the risk of crossing in front of the train?" Ans. "No."

"6. Was the train going, before the collision, at a more rapid rate than thirty miles an hour, or forty-four feet per second?" Ans. "Yes."

"7. When Hunter was thirty feet from the middle of the railroad track, was the locomotive further than three hundred and fifty-two feet from the same point?" Ans. "Yes."

"8. Was it possible, in the exercise of ordinary prudence, to stop the train when going at the rate of thirty miles an hour, in the distance of three hundred and fifty-two feet?" Ans. "No."

"9. Was not Hunter's death caused in part by his own negligence and imprudence in attempting to cross the track in front of the approaching train?" Ans. "No."

And thereupon the appellant moved the court to render judgment for the defendant upon the special findings of the jury and their answers to the interrogatories propounded to them, notwithstanding the general verdict, because said answers and findings show,

1. That Hunter's negligence contributed to the injury that caused his death, and that he did not exercise ordinary diligence in crossing the railroad before and in full view and hearing of an approaching train, when he knew the train was approaching.

2. And the defendant was not guilty of such gross negligence as showed a willingness to inflict the injury or a disregard of consequences.

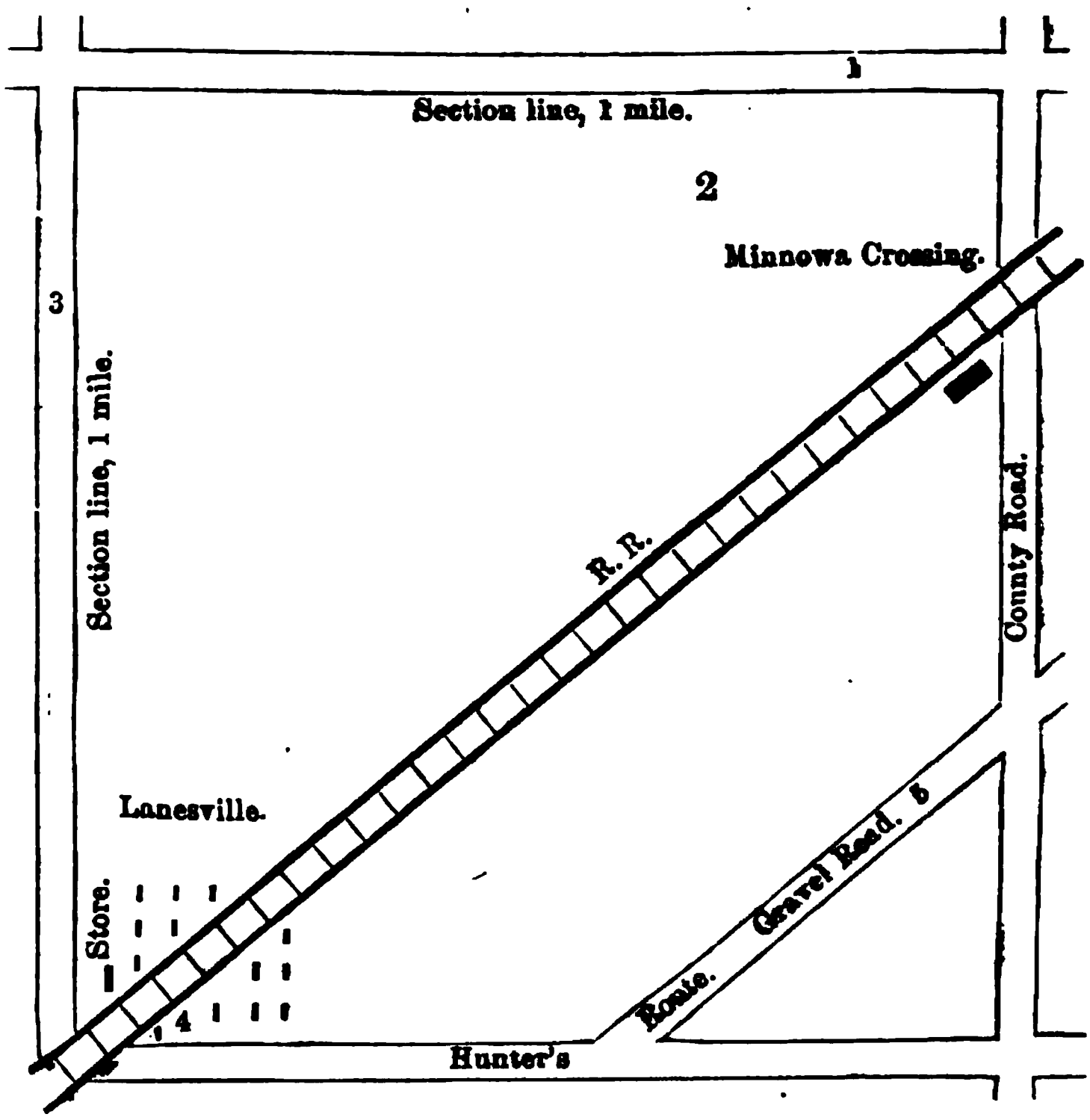
This motion was overruled by the court, and this action is assigned for error.

In case where the special findings of a jury are successfully used to control their general verdict, it is required that all the facts to authorize an adverse conclusion should appear by such special answers. Thus, although it appears that Hunter had notice of the nearness of the time when the train would be due when he was at Lanesville; that the noise of the approaching cars could be distinctly heard on

the road leading from the gravel road to Minnowa crossing; that such train was visible to a person on the highway thirty feet south of the railroad crossing; and that Hunter had full possession of the senses of sight and hearing; yet the finding does not place Hunter where the noise could be heard or the train seen. The action of the court was therefore correct.

The proof, however, supplies all these omissions.

By agreement of parties, a map, of which the following is a copy, was put in evidence as a correct representation of the place of the collision:



About one mile north-east from Lanesville, in Marion county, at a point called Minnowa Crossing, a county road running north and south, on the section line, crosses the

railroad. The railroad runs straight, in a north-easterly direction, from Lanesville to a long distance beyond Minnowa Crossing. There is a platform at the crossing, where trains sometimes stopped, but express trains did not stop there. East of the crossing there was timber on both sides of the railroad, but the timber did not grow as close to the road on the south side as on the north side. A person traveling on the county road from the south, toward the railroad, when within fifty yards of the railroad, could plainly see a train approaching from the north-east for one hundred and fifty yards. There was no obstruction to the view.

Wm. Records, one of appellee's witnesses, testified, that a man driving a team fifty yards south of and towards the railroad could see the approaching train for a quarter of a mile.

To a person approaching the railroad on the county road, when within thirty feet of the railroad, the approaching train was plainly visible, without obstruction, for a mile. Upon this point there was no conflicting evidence.

The road from Lanesville to Minnowa Crossing, as shown on the accompanying map, is not further than a quarter of a mile from the railroad; and the cars can be easily and plainly seen and heard by persons traveling on said road.

According to the evidence of the conductor, the engineer, and the fireman on the train, and one of the appellee's witnesses, the train approached the crossing at about the rate of twenty-five miles an hour; by other witnesses it was placed beyond this speed; by the finding of the jury, at from thirty to forty miles an hour.

Witnesses, some at the time at a distance of more than a mile from the collision, heard the noise of the approaching train some minutes before the collision.

Andrew Ward, the first witness introduced by appellee, who was driving a wagon a quarter of a mile from the crossing, heard the cars coming very plainly three or four minutes before the collision. See 1 on map.

The next witness, Louisa Stiers, a little girl, a quarter of a mile distant, reading a paper, heard the coming train for "some time;" and the noise was so loud that it caused her to get up from her seat and look over that way before there was any collision. See 2 on map.

Hattie Stiers, a sister, also introduced by appellee, while eating supper on the north porch of the same house, heard the train coming "a few moments" before the collision. See 2 on map.

Jane Stiers heard the coming train before the collision, and spoke of the fact that it was coming fast, while eating supper on the same north porch. See 2 on map.

Zaccheus White, a witness introduced by appellee, was traveling from his house to Lanesville, on a road parallel with the one on which Hunter was traveling, about a mile west of the crossing, and "heard the train some time before it whistled. I heard it before I left my house." See 3 on map.

Elijah D. Wilmington, who was at Mr. Smart's, where Hunter lived, "a quarter or a half a mile" from the crossing, and was engaged at the time pulling roasting ears in the field, heard the cars coming before the collision.

Joseph Landis, merchant and express agent at Lanesville, distinctly heard, at the distance of a mile, the noise of the coming train a minute or a half a minute before the collision. See 4 on map.

I. N. Reddick, unloading gravel on the same road that Hunter traveled, half a mile from the crossing, heard the noise of the approaching train before the collision. See 5 on map.

William H. Hunter was twenty-two or twenty-three years of age, and in the full possession of the senses of sight and hearing. His mother's residence, where he had long lived, was close by the railroad station at Lanesville. He had been employed as a brakesman on the road a few months before the collision. At the time of the collision, he was living with Mr. Smart, three-quarters of a mile from

the crossing, within hearing of the passing trains. Mr. Smart was asked the question, "Do you know whether Hunter knew what times the regular train passed that point or not?" He answered, "Yes, he kept his watch with it. I believe he had his watch with him that day." Hunter was in the habit of passing this crossing with Smart's wagon. That day he had gone to Lanesville. Before he left Lanesville he was in a store where the post office was kept. The postmaster had made up the mail, and laid the mail bag on the counter near Hunter, and mentioned the fact to him that the train was about due, and then went to the door to look for the train, in the presence of Hunter.

N. B. Freeman testifies, "He was there five or ten minutes before the train was due. We were talking something about the train. I had the mail already made up. It was the mail train. We were waiting for this train. The mail bag was lying on the counter. Hunter was standing by the counter getting his tobacco. There was something said about the train, but I could not tell what it was now. I was looking for the train, and something passed about its being perhaps five or eight minutes till train time. I know we were talking about the train being due or about due. I went to the door once, I know, to look for the train, while he was in the store. He bought some smoking tobacco, lit his pipe, and went out of the store to his wagon. He had a wood wagon, I think, and two horses. He drove up towards the pike, the road that leads to the crossing, about as fast as his horses could go in a trot, a fast trot. He did not go out of a trot, but seemed to be in a hurry."

On cross examination, he was asked:

Q. "Did you notice the train as it came to the crossing at Minnowa?"

A. "I heard the train before it got there."

Q. "Did you hear the crash?"

A. "Yes, and three distinct blasts of the whistle."

J. N. Reddick testified, "On the 30th day of August, 1867, I was drawing gravel on the gravel road that runs through

Lanesville. I met Mr. Hunter a little more than a quarter of a mile from the crossing, on the gravel road. It is about a quarter of a mile from Minnowa Crossing to where the county road intersects the gravel road. I met Hunter about one hundred and fifty yards from the intersection. I spoke "good evening" to him, and he to me. He was sitting on the right side rail of the wagon—it was a wood bed—with his arm around one of the stakes. He was smoking his pipe. He had his back to the east, and the lines in his left hand. He was driving not very fast, in a moderate trot. I came on west toward Lanesville. I heard the train come along when I stopped to unload gravel, about a quarter of a mile from where the county road intersects the gravel road, I suppose about a half a mile from Minnowa Crossing. I heard the train approaching there. I heard the collision at that time. I do not know that I can tell you how long I heard the noise of the approaching train before the collision; it was a few minutes. Loading and unloading gravel makes a good deal of fuss. I heard the noise of the train coming. The wind was blowing from the north. There was a pretty cool air moving. I turned myself around to see what had happened, but could not see what was the matter. They whistled several times, to put down the brakes, I suppose. I drove back to the crossing and saw a good many men, none of them neighbors. I met the conductor fifty steps south of the railroad, coming to see if I could recognize the man."

Charles Andrew Crane testified, "I was fireman. At the time, I was on the running-board on the left hand of the engine, wiping the engine off. We were about on time, and traveling at about twenty-five miles an hour, about our usual rate of speed. My back was toward the way he was coming, and the first I noticed of him or the wagon was when the whistle blew. The moment I turned and looked that way, I saw the man and the fragments of the wagon going off to the left hand side of the engine, the south side of the railroad track. The horses ran off down the

track. After we stopped and backed the train up, I saw them down the road apiece, and did not suppose from appearances they were injured very badly."

Peter Crane testified, "I was engineer on the train. My son, Charles Crane, was fireman. Frederick Crane, my son, then in his twelfth year, was also along with me. He rang the bell most of the way from Union City to Indianapolis. At the time, I was sitting on the right hand side of the engine, looking through the window or door, I don't know which. I know I was looking out ahead. I presume the door was open, as it was warm weather. There was a glass in the widow. I could see both sides of the track thirty feet ahead of the train."

Q. "Then if you had been looking out ahead at this time, could you not have seen any thing that came upon the track on either side of the road?"

A. "Not any way close to the engine. You would not see the opposite side much nearer than that. When I was very near the crossing, some twenty or thirty rods from it, I motioned to my little boy, who was sitting on the left hand side of the cab, to ring the bell, and I suppose he did it. I probably passed a little beyond the point where I usually rang the bell, or where it was usually rung, before he rang the bell. The first intimation I had of the fact that the wagon was coming, was when my little boy told me there was a team coming on the track. I pulled the whistle instantly, before I saw the horses' heads. Looking out on the north side, I saw the wagon pole and the heads of the horses cross the track just an instant before the collision. I did not see anything else connected with the collision at that time. I did not see Hunter at all, till I saw him on the platform, after he had been struck. I could not say how long it was from the time I pulled the whistle till the collision; the time was very short. The train ran six hundred feet, or such a matter, before it came to a dead halt. I judge it was stopped about as quick as it could be stopped. I reversed the engine. I do not think I got the engine en-

tirely reversed till I got past the crossing. I had the reversal part way back when I was on the crossing. If I had seen the person approaching the track from the left hand side, I could not have stopped the train in time to prevent the collision. I had been engineer on that train for two years. I have followed the business for twenty-one years. The train was on time—not more than a couple of minutes behind anyhow—and was traveling at the rate of from twenty to twenty-five miles an hour."

Samuel Gochenaur, the conductor, testified that the train was on time and making the customary rate of speed, from twenty-five to thirty miles an hour.

Q. "What was the first you knew of the fact that there was anything in the way at Minnowa crossing?"

A. "A signal whistle. I was in the rear car, and when I heard the whistle I stepped on the back platform and looked ahead on the north side of the train, and saw a couple of horses going against the fence. About the time they struck the fence the rear end of the train was on the crossing. When the train stopped I got off and walked forward to the engine, and asked the engineer what was the matter. I then went around to the other side of the train, and saw the brakeman picking up the man in the ditch behind the train. They took him down to the platform, and I walked down there as quick as I could and found him nearly dead. Then I signaled the engineer to back the train, in order to get the man into the baggage car, and by that time some gentleman came along the road driving a team from the south, and I beckoned him to come up. I understand his name is Reddick. I did not see any person else that lived in that neighborhood. The train went about three times its length past the crossing before it stopped. Its length was about two hundred and twenty-five feet. A train going at the rate of twenty-five miles an hour will run three or four train lengths in being stopped."

Error is assigned upon the admission, over the objection of the appellant, of certain evidence offered by the appellee.

The appellee introduced Zaccheus White, and asked him:

Q. "Were you at Lanesville station when the train came down there?" Ans. "Yes."

Q. "State what you did when you got to Lanesville."

A. "I was standing right by the engine when the train stopped."

Q. "Did you see the body of Mr. Hunter when it was taken off the train?"

A. "Yes; I helped to take charge of it."

Q. "If you had any conversation at that time with the fireman of that train as to the rate of speed at which the train was running when it came to Minnowa Crossing, state what that conversation was."

The defendant objected for the reasons following:

"We do not admit that a railroad company can be bound by any admissions or statements of any agent, unless such admissions or statements were made within the scope of his authority. The plaintiff here proposes to prove what was said by some employee of the company, not at the time of the collision, but afterwards; not at the place of the collision, but at a different place, the next station on the road. The conversation cannot be let in under the rule in regard to *res gestæ*; that rule cannot be applied to a thing of this sort. The fact that the dead body of Hunter was on the train, still in the hands of the company, does not alter the case. If that circumstance were allowed to justify the admission of these statements in this case, then upon the same principle, if the company had brought the body from New Orleans to Indianapolis, any fireman on the train could bind the company by his statements at the latter place. Furthermore, we insist that if a *tort* has been committed, the admission or statement of an agent, after the commission of the *tort*, can never be competent to bind the principal. This fireman was acting within the scope of his authority in running the engine, but not in making the statements, if he made any, which the plaintiff seeks to introduce."

The objection was overruled by the court, and the defendant excepted.

The witness then answered, "He said the train was running over forty miles an hour, between forty and sixty miles an hour, somewheres. He said he could not tell any difference at all between the signal and the collision of the engine with the wagon; that the man was sitting with his back toward the train; and that he did not think the man saw or heard the train, or knew there was any train in reach of him. He said he never moved out of his position till he was struck. He said there was no signal at all."

The appellant asked the court to give the following instructions, which the court refused to do, and the appellant excepted:

"5. The accident in this case took place at the intersection of the railroad track and a public highway, and it is the duty of a traveler approaching a railroad crossing to look along the line of the track, if possible, and see if any train is coming; and if you find, from the evidence, that the deceased failed to take such precautions before the happening of the accident, then he was guilty of negligence, and you will find for the defendant.

"6. A traveler approaching a railroad crossing on the public highway is bound to exercise ordinary care, and vigilance, and foresight, in proportion to the danger to be avoided and the fatal consequences involved in his neglect. His vigilance should be quickened, not slackened, by the fact that he could not see the track sideways to any distance till he got on the track. And if the decedent could not see an approaching train by reason of any obstruction to the view, then he was called to greater care and watchfulness in driving upon the track than if the view had been open. *And if he heard, or in the exercise of ordinary care and watchfulness might have heard, the noise of the coming train, and then drove upon the track, without first fully ascertaining that there was no danger from collision, he was guilty of negligence, and you will find for the defendant.*"

This instruction was given after striking out the part printed in italics, to which appellant excepted.

"7. It is not enough to entitle the plaintiff to recover in this action, that he established the fact that the defendant neither rang the bell nor sounded the whistle. If you find these facts proved by a preponderance of testimony, then it must further appear to your satifaction that the accident was brought about by reason of this omission. And if the decedent had notice in any other way, of the approach of the train, either from a knowledge of the train time, or by notice given that the train was coming, or by the noise of the running train, that it was approaching, and with this knowledge heedlessly *and recklessly* drove upon the track without first apprising himself that he could cross in perfect safety to himself and the defendant, then the plaintiff cannot recover, and you will find for the defendant."

This instruction was given after the words "and recklessly" had been inserted by the court, over the objection of appellant.

"12. If the jury believe, from the evidence, that the collision resulted from the fault or negligence of both parties, and Hunter's fault was upon a point which he knew, or had reason to believe, would or might contribute to the injury, then the plaintiff cannot recover.

"13. If Hunter was guilty of negligence, or did not use ordinary care to avoid the injury, the plaintiff cannot recover in this case, unless the defendant has been guilty of such gross negligence as to imply a disregard of consequences or a willingness to inflict the injury, and from the consequences of which Hunter could not escape by reasonable diligence."

The court gave the following instructions:

"1. This action is brought by George W. Hunter, as administrator of Wm. H. Hunter, deceased, against the Bellefontaine Railway Company, to recover damages alleged in the first paragraph of the complaint to have been sus-

tained by reason of the defendant, by her officers, agents, employees, and servants having carelessly and negligently run the locomotive and cars of the defendant upon and over William H. Hunter, thereby causing his death, the said William H. Hunter being then and there without fault in the premises.

"2. In a second paragraph of the complaint it is alleged that the defendant's agents, officers, employees, and servants recklessly, wantonly, and with gross carelessness and negligence, ran the locomotive and cars of the defendant over and upon Wm. H. Hunter, thereby causing his death, Wm. H. Hunter being then and there without fault or negligence in the premises.

"3. The defendant denies the matters set out in the complaint; and to entitle the plaintiff to recover, the material matters alleged in the complaint must be sustained by a preponderance of evidence.

"4. The plaintiff cannot recover in this action unless Wm. H. Hunter could have maintained an action for injuries received by the same acts of the defendant's agents or employees, had he lived.

"5. The right of the plaintiff to recover rests upon the facts assumed in the two paragraphs of the complaint—in the first, that the defendant, by her agents and employees, caused the death of Wm. H. Hunter by their carelessness and negligence in running the locomotive and cars of the defendant, and that there was no negligence or want of ordinary care on the part of the deceased, contributing, in any degree, to his death.

"6. To entitle the plaintiff to recover under the first paragraph, you must therefore find that the agents or employees of the defendant were negligent and careless in running the locomotive and cars, thereby causing the death of Hunter, and that Hunter was free from any negligence in any degree contributing to his own death.

"7. In the second paragraph it is charged that the defendant, by her agents and employees, caused the death of

Hunter, by recklessly, wantonly, and with gross carelessness and negligence running the locomotive or cars upon or against him, he being without fault or negligence.

"8. Under this paragraph, if you find, from the evidence, that the agents or employees of the defendant in charge of the locomotive and cars, recklessly and wantonly, and with gross carelessness and negligence, ran the same upon or against William H. Hunter, thereby causing his death, the plaintiff will be entitled to recover, though the deceased may not have used ordinary care to avoid the injury, unless his failure to use ordinary care was upon a point his own negligence of which resulted in his death.

"9. The injury causing the death of Hunter occurred at a place where a public highway crossed the railroad of the defendant, where each had a legal right to pass; and the rights and duties of a railroad company in running their cars and of persons traveling on a public highway crossing the track of a railway are mutual; each has the right to pass, and each is bound to use ordinary care and diligence, in doing so, to avoid injury to the other. Travelers upon the highway and the agents or employees of a railway company may each act upon the presumption that the other in their conduct will act in accordance with the legal rights and duties of both.

"10. In this connection, it is perhaps well to define some of the terms which have been much used in the argument of the cause and in these instructions. By the term 'ordinary care' is meant that degree of care which persons of common and ordinary prudence usually exercise in their own affairs. This degree of care must, however, vary according to the circumstances. It must be proportionate to the dangerous character of the business and of the mode and means of conducting it; and the degree of vigilance which the law exacts in requiring the exercise of ordinary care varies with the probable consequences of negligence, and also with the command of means to avoid injury to others possessed by the person on whom the obligation is

imposed. Or, as applied to both the plaintiff and defendant in this case, it is such a degree of care, skill, and diligence as men of ordinary prudence under similar circumstances usually employ.

"11. Gross negligence is sometimes defined to be 'the absence of slight care, or that degree of care which every man of common sense, though very absent and inattentive, applies to his own affairs.' As applied in this case, to charge the defendant by her agents and employees with having recklessly, wantonly, and with gross carelessness and negligence, caused the death of Wm. H. Hunter, as set out in the second paragraph of the complaint, it must appear from the evidence that the negligence of the agents and employees of defendant was so gross as to imply a disregard of consequences or a willingness to inflict the injury.

"12. The term recklessness, as applied to management of the train, is such gross negligence as is utterly regardless of consequences.

"13. It was the duty of those in charge of the train of the defendant, when approaching the crossing, to give some signal, by ringing the bell, sounding the whistle, or otherwise, calculated to call the attention of an ordinarily prudent man passing on the highway to the approach of the train, unless you believe the railroad track to have been in such public view, or the noise made by the running of the cars sufficient to enable an ordinarily prudent man, exercising usual care, to have notice of the approach of the train and avoid collision. And it was their duty also to exercise care in running the train at a reasonable rate of speed, such a rate of speed as would enable a prudent man exercising ordinary care to avoid collision; and when it becomes evident that contact is liable to occur, it is their duty to use all reasonable means to avoid it. In this action, you must determine from the evidence what means were proper to be used, under all the circumstances of the case, to avoid the collision.

"14. It was the duty of the deceased, in charge of the

horses and wagon, in approaching the crossing, to exercise such care as a person of ordinary prudence would, under similar circumstances, usually employ in looking out for the approach of the train and acting so as to avoid contact with it; and if you believe from the evidence that the exercise of such care would have prevented the accident, you will find for the defendant, unless you find that the collision resulted from such gross negligence and recklessnes on the part of those in charge of the train as to indicate an entire disregard of consequences or a willingness to inflict the injury.

"15. If the jury believe from the evidence that no signal was given, before approaching Minnowa Crossing, by the employees of the railroad company, and that the train was going at an extraordinary rate of speed, this did not justify Hunter in encountering the risk of crossing, if he saw or heard the approach of the engine or was otherwise satisfied of its presence in season to avoid the peril.

"16. A party who sees or hears an approaching engine, or is otherwise notified of its near approach, and chooses to take the risk of crossing before it rather than await its passage, forfeits all claim to redress.

"17. If, under the evidence and these instructions as to the law applicable in the case, you find the plaintiff will be entitled to recover, it will be your duty to determine the amount which in your judgment the plaintiff should receive. This will be such a sum as you deem a fair and just compensation, taking into consideration the circumstances surrounding the deceased, his family relations, &c., the amount to be determined by the exercise of a sound discretion; but in no event can it exceed the sum of five thousand dollars."

It is objected that the bill of exceptions does not state that it contains all the evidence given in the cause.

The bill of exceptions shows the impanelling of the jury and the introduction of evidence by the plaintiff; and it states at the close of the testimony of a large number of.

witnesses, "and here the plaintiff rests, and evidence for the defendant is heard as follows." The evidence of witnesses for the defense is set out, concluding, "and here the defendant rests, and the plaintiff doth the like." But the plaintiff has introduced no rebutting evidence, and upon what then does he rest, except upon the evidence already stated? Indeed, while a reasonable strictness in pleading and practice aids in the due administration of justice, it is yet true that any illiberality in the application of the rule requiring it to affirmatively appear that a bill of exceptions contains all the evidence given in the case, can only defeat this purpose. We know that a judge trying a cause below does not sign a bill of exceptions in which any portion of the evidence is stated, unless he believes it to contain all the evidence given. The omission to state this fact in words does not aid in the correct decision of the case, if we therefore reject the evidence stated. For this reason, we did not continue in force a heretofore-existing rule which required the use of certain words at the conclusion of a bill of exceptions to indicate the completeness of the record. Any language which implies such a condition of the record is sufficient. But with this comment we conclude. We do not determine whether the bill of exceptions is sufficient to enable us to examine the evidence upon the issue whether or not it sustains the finding. We will accept the fact that such evidence as is contained in the bill of exceptions was given; and while we will not rest our decision upon the instructions given, we will examine into the correctness of the rulings upon the admission of evidence, not however excluding ourselves from an examination of the instructions.

Upon the question of the admissibility of the reported statements of the fireman who was upon the engine at the time of the accident, it seems scarcely required that authorities should be cited. Such evidence was plainly improper. The appellant has cited us to *Luby* v. *The Hudson River R. R. Co.*, 17 N. Y. 131, where the precise question is decided.

This was an action for running a horse car over plaintiff

in the street. A policeman was permitted to prove, over defendant's objection, that after the accident he arrested the driver, and that as he was getting off the car, and out of the crowd which had surrounded it, he asked him why he did not stop the car, to which the driver replied, the brake was out of order. The court held: "The declarations of an agent or servant do not, in general, bind the principal. When his acts will bind, his statements and admissions respecting the subject matter of these acts will also bind the principal, if made at the same time, and so that they constitute a part of the *res gestæ*. To be admissible they must be in the nature of original, and not of hearsay evidence. They must constitute the fact to be proved, and not be mere admissions of some other fact. They must not only be made during the continuance of the agency, but in regard to a transaction pending at the very time. The declaration was no part of the driver's act for which the defendant was sued. It was not made at the time of the act, so as to give it quality and character. The alleged wrong was complete, and the driver, when he made the statement, was only endeavoring to account for what he had done." The case was reversed for the error of admitting this evidence. *Moore* v. *Mcacham*, 10 N. Y. 207; *Lane* v. *Bryant*, 9 Gray, 245.

It is insisted that even if erroneously admitted, still the evidence is not shown to have influenced the jury, and therefore the error may have been harmless. It is plain, however, that the rate of speed at which the train was moving did, whether properly or not, form an important element in leading the jury to the conclusion that the death resulted from the negligence of the appellant. The admission of White fixes the rate at the highest stated by any witness, and the jury have adopted his minimum, although no other witness testified to even that speed. But where error has occurred in the admission of improper evidence, it must affirmatively appear that no injury was caused by such error; and the action of the court below in overruling the motion

for a new trial is not, as appellee insists, presumptive evidence of the fact. The court below, doubtless, having admitted the evidence, overruled the motion for a new trial upon the ground that no error had occurred. Nor is the opinion of the judge trying the cause below, if accessible to us, as to the particular evidence which influenced the action of the jury, entitled to special consideration. Where improper evidence, material to the issue, has been admitted, the presumption is that it worked injury; and no mere matter of opinion or speculation will justify us in affirming a judgment rendered upon a verdict thus obtained.

This decision involving a reversal of the case, we will, without further question as to the completeness of the bill of exceptions regarding the evidence, proceed to examine the correctness of the instructions given, as applied to the evidence before us, there being no question that the instructions are fully stated.

Bg. # In *The Toledo and Wabash Railway Co.* v. *Goddard*, 25 Ind. 185, the doctrine was stated thus: "Where negligence is the issue, it must be a case of unmixed negligence, to justify a recovery; and if both parties, by their negligence, immediately contributed to produce the injury, neither can recover." The authorities then supporting the position were very fully stated. Later decisions have only confirmed the rule, which, indeed, rests upon the case of *Butterfield* v. *Forrester*, 11 East, 60, where Lord ELLENBOROUGH held, that "a party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right."

In *The Lafayette and Indianapolis R. R. Co.* v. *Huffman*, 28 Ind. 287, the negligence on the part of the plaintiff which will defeat his action is again stated and applied, even when an infant is the injured party. The court below had instructed that if the servants of the company had failed, in the management of the train, to use such diligence and care as prudent and discreet persons should use, &c., and

the plaintiff was injured, he was entitled to recover, unless from his own negligence or want of reasonable care he had brought the injury upon himself. The court say this is not the law. It is not necessary that the negligence of the plaintiff should have "brought the injury upon himself." If it directly contributed to that result, it would have defeated the action, where the defendant was only chargeable with want of ordinary prudence. The following instruction given by the court below, viz.: "Although the plaintiff was in fault, yet if the employees of the defendant might with reasonable diligence have avoided the injury, it was their duty to have done so; and their failure to do so would render the company liable," is thus disposed of: "That is not the law. Where the plaintiff is in fault, a want of reasonable diligence will not render the defendant liable."

In *The Indianapolis and Cincinnati R. R. Co.* v. *Rutherford*, 29 Ind. 82, the jury found specially, that the injury (a broken arm) would not have happened if the plaintiff had kept his arm inside the car. Yet the jury gave the plaintiff a verdict of seven hundred dollars against the railroad company. The latter appealed. The court say: "This judgment cannot stand. The place for the passenger is inside, not outside the coach. This is known to everybody who ever saw a railway car. Nothing is better settled than that in such a case, if the plaintiff's negligence has contributed to the injury he cannot recover."

In *Telfer, Adm'r*, v. *The Northern R. R. Co.*, 30 N. J. 188, where the action was for killing the plaintiff's son, who was crossing the track of the defendant on a public road, it was said, "In crossing ordinary roads, caution and care are chiefly demanded to avoid running against or over anybody else; in crossing railroads, it is exacted to avoid being run over yourself. In the former case, the blame attaches *prima facie* to the party doing the injury; in the latter, it attaches, in the first instance, to the party obstructing the track." The court say, "whether the whistle was blown or bell rung upon the approaching engine, is imma-

terial, if the boys knew, or with ordinary caution might have known, in time to avoid the collision, that the train was approaching. Although the engineer saw the boys approaching the crossing, while yet at such a distance as not to indicate their ignorance of the coming train, it was his right to suppose they did not mean to attempt to cross before the train; and if he acted upon that impression, it was not negligence or want of ordinary caution on his part, although the supposition proved to be groundless." It is said that the law does not require that the speed of a railway train should be lessened when crossing any other way, unless the track be concealed from view, or passing through some thronged street or highway. The railway is but a single track on which cars can run, and there is no limit to the speed except the safety of the train. All other conveyances are under more immediate control, and can turn to the right or left or stop and avoid injury. "All persons and things are perfectly safe from collisions except on this narrow track, and cannot be harmed unless they go upon the track; consequently, every person is under the strongest possible obligation not to venture upon that track when the cars are about to pass. If he do so and get hurt, it can scarcely be otherwise than that the risk and the fault are his own. Nor does it make any difference how strongly the party may believe or suppose that he can cross with safety. If he gets hurt, the miscalculation was his own, and the consequences must rest upon him. Nor does it at all change the case that the party did not think of the cars. He was bound to think of them, if he knew the road was there. Nor is it any excuse that he was in a covered wagon, and did not see, or did not see fit to look; for a person cannot close his eyes or cover himself up in the midst of danger and then plead that he could not see. It is not a trifling matter to stop a train of cars where it would not otherwise stop, when it is running on time and is required to pass another train at a given point, and when the failure to do so might produce serious consequences. I do not

think a conductor is bound to stop his train because he sees an individual standing on the track a quarter of a mile ahead of him; because he has every reason to suppose that he will leave the track before the cars reach him. Nor do I think he is bound to stop his train because he sees a vehicle slowly approaching the road, or quietly standing a few yards from it, with the horse's head towards it; for he has every reason to suppose that they will not attempt to cross until the train has passed."

If the engineer see a person on the track, to whom the train must be in full view, and there is nothing to indicate a want of consciousness or capacity, he would not be bound to stop his train. He would have the right to presume that the party would remove in time to avoid the danger. *The Philadelphia and Reading R. R. Co.* v. *Spearen*, 47 Penn. St. 300.

In *The North Pennsylvania R. R. Co.* v. *Heleman*, 49 Penn. St. 60, it is held to be the duty of the traveller approaching a railway crossing, to look along the line of the railroad track and see if any train is coming; and if he fail to take such precaution, it is more than evidence of negligence—it is negligence itself, and the court should so charge the jury.

This, indeed, is the true rule; for when it is determined as a legal proposition that one may not rush blindly upon the rails over which trains are passing propelled by an agent serving its master almost at its own will, the neglect of this duty to use the physical senses is negligence, and not mere evidence of negligence.

In *Dascomb* v. *The Buffalo and State Line R. R. Co.*, 27 Barb. 221, the facts were these: The plaintiff lived near and owned land on both sides of the New York Central R. R. At four o'clock, P. M., he was proceeding across the road, at what is called the Camp Road Crossing. The highway and the railway crossed nearly at right angles and at grade. The passenger train was then due. There is no evidence that those in the wagon looked for the train or took any precaution whatever. The result was that the wagon

was struck, Dascomb's son killed, and he himself severely injured. The court say: "It should and must be regarded as very little short of recklessness, for any one to drive on the track of a railroad without first looking and listening whether a moving train is near. The negligence of the defendant in this case was a failure to ring the bill or sound the whistle. Yet, as Dascomb was also negligent, he could not recover. Those living near a railroad may, by contact, become careless; but they will be no less chargeable with negligence in case they rush on the track without looking and trying to ascertain first whether danger is near. Failing in this respect, they cannot be permitted to recover for injuries received. It is a well settled principle of the common law, that he whose negligence has contributed in any essential degree to the injury sustained cannot maintain an action against the party whose negligence has also contributed to the injury. When negligence is the issue, it must be a case of unmixed negligence. This rule is important, salutary in its effects, and should be maintained in its purity. The careless are thereby taught that if they sustain an injury to which their own negligence has contributed, the law will afford them no redress."

If a party rushes into danger, which by ordinary care and prudence he could have seen and avoided, no rule of law or justice can be invoked to compensate him for the injury he may have so received. *Chicago and Alton R. R. Co.* v. *Gretzner*, 46 Ill. 74.

In *Ernst* v. *Hudson River R. R. Co.*, 39 N. Y. 61, Judge CLERKE uses this language: "Any contributory negligence of a person attempting to cross a railroad track undoubtedly excuses the railroad company, whether the required signals are, or are not, given; or whether the company is or is not guilty of any other negligence." Judge CLERK further adds, "the rule of this court is not ignored or modified by any former opinion, that where the injured party has not used ordinary care, there can be no recovery against the company."

Judge WOODRUFF repudiates the idea that the railroad company was legally bound to keep a flagman at that station; or that the omission to do so was negligence *per se*. "There is no such rule of law; no statute requires it." Again, "It is not denied that if the intestate (Ernst) was guilty of negligence, contributing to the injury, the plaintiff was not entitled to recover." Again, "A traveler is bound to use his eyes and ears as far as there is opportunity." "Negligence in the railroad company to give the proper signals, or in omitting precautions of any kind, will not excuse his (the traveler's) omission to be diligent in such use of his own means of avoiding danger." "And when by such use of his senses the traveler might avoid danger, though the company neglect to give signals or warning, yet his omission (to be diligent) is concurring negligence, and should be so peremptorily declared by the court."

A leading case on the question at issue is *Wilcox, Adm'x,* v. *The Rome, &c. R. R. Co.*, 39 N. Y., 358.

In that case, the intestate was crossing the track on Court street in the village of Watertown. The track and the trains on it were in plain sight for a distance of eighty rods. The street and the track cross each other at right angles. A special train came to the crossing at the rate of about fifteen miles an hour, without ringing the bell or sounding the whistle as it approached the Court street crossing. There was no signal man stationed at the crossing. While the deceased was on the track near the Court street crossing, and twenty-five feet inside the east line of the street, he was struck and carried forty-five feet. He died of his injuries.

The court held, that "where deceased was killed in attempting to cross the railroad track within the limits of the public highway, and at a public crossing, if it appear that the deceased would have seen the approaching cars in time to have avoided them, had he first looked before he attempted to cross, it will be presumed he did not look; and by omitting so plain and important a duty, he will be

deemed to have been guilty of negligence which precludes a recovery."

In the *Galena and Chicago Union R. R. Co.* v. *Loomis*, 13 Ill. 548, the court held, "that if without signals, the injured party might, with care, have seen the train and known that it was aporoaching, he could not recover. A failure to ring the bell or sound the whistle does not raise a presumption that this was the cause of the injury." The omission of these signals is no more, and no less negligence, than the neglect of any other duty. It is neither gross negligence, nor culpable negligence, nor any other degree of negligence. It is simply and only negligence. *Chicago and Mississippi R. R. Co.* v. *Patchin*, 16 Ill. 198; *Galena and Chicago Union R. R. Co.* v. *Dill*, 22 Ill. 264; *Illinois Central R. R. Co.* v. *Phelps*, 29 Ill. 447.

In *Pennsylvania R. R. Co.* v. *Henderson*, 43 Penn. St. 449, it is held, that the injured party is charged with knowledge, or regarded as knowing, if he had such warnings and opportunities of knowledge as would, with ordinary caution in these circumstances, have saved him from the danger. This, we think, is a correct statement of the law, and under such circumstances the party must be held to have knowingly contributed to his own injury.

In *Beisiegel* v. *New York Central R. R. Co.*, 40 N. Y. 9, it was held, that the common law does not impose the duty of warning by signals persons crossing their track, and that if the injured party by looking up the track, in the direction of the approaching train, could have seen it in time to have avoided the injury, his omission to do so was negligence.

In *Havens* v. *The Erie Railway Co.* 41 N. Y. 296, it was declared, that where the statute required signals to be given by the company on approaching a railroad crossing, and they were omitted, yet such omission did not absolve the person approaching such crossing from looking up and down the track, to see whether a train was approaching; and his omission so to do precluded his recovery.

In *Baxter* v. *The Troy and Boston R. R. Co. Id.* 502, it is said, "The law requires care at all times when in a situation of danger, and mental absorption or revery, from business, grief, &c., will not excuse its omission. The inquiry is whether, from the evidence, it satisfactorily appears that the plaintiff, by looking, could have seen the train in time to have avoided the collision. If so, the plaintiff should have been non-suited."

In *Stubley* v. *London and N. W. R. W. Co.*, L. R. 1 Ex. 13, defendant's track crossed a much traveled foot-way; on each side was a swing gate some distance from the rails; at the west gate, owing to the pier of a bridge, a person could not see a coming train for over thirty yards south, but by going within the line and within about nine feet of the track he could see three hundred yards each way. The deceased came from the west to cross, and was detained by a freight train passing south. As soon as it had passed she proceeded to cross behind the train, and just as she reached the east track was struck down by an express train from the south, which she had not observed.

POLLOCK, C. B., said, "The track is of itself a warning of danger to those about to go upon it and cautions them to see whether a train is coming. There was no evidence to go to the jury."

BRAMWELL, B., said, "Passengers crossing the rails are bound to exercise ordinary and reasonable care for their own safety, and to look this way and that way to see if danger is to be apprehended."

In *Butterfield* v. *The Western R. R. Co.*; 10 Allen, 532, the "plaintiff was acquainted with the highway and railroad. If he had looked he would have seen the train. It came from the west, and for a half a mile west of the highway the track was in plain sight. It was a stormy night, raining, blowing hard from the north-west, and snowing some. He had his hand up holding his hat on his head and this prevented him from seeing the train. He was listening for the cars, his attention was called to the subject, and he ex-

pected to hear the bell or whistle, but there was no bell rung or whistle blown. Plaintiff's neglect to use his own eyes was palpaple negligence. The jury ought to have been instructed that he had offered no evidence of due care on his part, and was not entitled to a verdict."

In the case of *Cliff* v. *The Midland Railway Co.*, L. R. 5 Q. B. 258, Hilary Term, 1870, LUSH, J., uses this language: "I think that when the legislature authorizes a railway to cross a way, public or private, upon a level, and does not require from the company any precaution to avoid danger, the legislature intends that the persons who have to cross that line should take the risk incident to that state of things." It was held, accordingly, where the action was for negligence in knocking the plaintiff down and injuring him at a crossing of the railway, that it was error in the judge, in summing up, to leave to the jury as evidence of negligence in the railway company, the omission to keep a gate keeper.

We think the law may be regarded as fixed, that no neglect of duty on the part of a railroad company will excuse any one approaching such a crossing from using the senses of sight and hearing, where these may be available; and injury where the use of either of such faculties would have given sufficient warning to enable the party to avoid the danger, conclusively proves negligence, and there can be no recovery; unless the railroad company has been guilty of such conduct as will imply an intent or willingness to cause the injury; and this can only be attributed where the company has notice of the particular emergency, in time, by the use of ordinary diligence, the means being at hand, to avoid the collision.

In *The Indianapolis and Cincinnati R. R. Co.* v. *McClure*, 26 Ind. 370, where the action was for killing stock, a quotation is made from Redfield on Railways, an author whose language it were well always to carefully weigh, stating that this willingness to injure "is always to be attributed to the defendant, if he might have avoided injuring the plain-

tiff, notwithstanding his own negligence." The decision, however was in express contradiction of this rule; for it is admitted that the company in that case were guilty of carelessness in running their train at too great speed, and yet they were held not liable. The reporter inadvertently carried into the syllabus this erroneous statement of the law, the use of which was simply incidental and not material to the decision. Such a doctrine would require the exercise of the highest degree of diligence on the part of the defendant to protect the plaintiff from the consequences of his own negligence.

In the case before us, each party had a right of passage, limited by that maxim of equity, *sic utere tuo, ut alienum non lædas*. Upon each rested the obligation, in the exercise of this right, to use such reasonable degree of foresight, skill, capacity, and care, as would be consistent with a proper regard for the safety of all others exercising the same right and using the like precautions. We do not say that such care must be used by each as would prevent the possibility of injury to himself or another. There are inevitable accidents. But such care is required as would reasonably and under all ordinary circumstances avoid collision with one using like caution — such care as a prudent man in the exercise of his usual diligence will observe. It is true that prudent men are sometimes careless. When so, they must accept the consequences of their departure from their usual line of conduct, and the exception is not to mark the amount of care exacted by the law.

Of necessity, the special acts, the omission of which would on the one part constitute carelessness, may not be required from the other party. One approaching in a carriage, on the highway, the crossing of a railroad, over which express trains at a high rate of speed are frequently passing, may reasonably be required to assure himself, if he can, by the use of his organs of sight and hearing that no cars are in dangerous proximity. If the use of such means would give the information, he may properly be charged

with such knowledge. If necessary to make such observation, he will be required to reduce the rate of speed at which he is moving, or even to stop his conveyance; and where regular trains are passing, he should take notice of the time when they are due, if such information is reasonably accessible. On the other hand, the company are required to keep a reasonable look out at public crossings and to give such signals of their approach as are calculated to notify the public, when without such signals, and in the exercise of the proper care and caution by the public, their proximity would not otherwise be known. Thus, if the track were concealed from view, and the sound of the train from high wind or any other cause was destroyed, it would devolve upon the company to use any other usual and proper method to give notice to passengers upon the highway. But an express train, having connections to make where failure may involve the loss of many lives, cannot be required to stop, or even materially reduce its speed, at every cross road where their approach is in full view and the sound of of the train apparent to persons upon the public way.

By statute in many states certain signals are required to be given by a train when nearing any public crossing, and therefore their neglect to comply with the law under such circumstances is negligence; but no such special act is now required in this State, and therefore its omission is not in itself negligence, unless the peculiar circumstances, the concealment of the train or the like, may render it necessary and proper.

The fifth instruction asked by the appellant should, under the evidence before us, have been given. The objection that it did not hold the appellant liable for gross negligence is of no force, for there is no evidence of any witness from which such intent or willingness to inflict the injury could be inferred. The sixth instruction asked should also have been given without modification. It is objected that the words "without first *fully* ascertaining that there was no danger from collision" are too broad, and that the test

should be the conduct of a prudent man under the circumstances. But while negligence is, in general, a mixed issue of law and fact, yet it is equally true that when the fact which it is claimed constitutes negligence is found, its legal character and consequences become a matter of law. *The Toledo and Wabash R. R. Co.* v. *Goddard*, 25 Ind. 185; *Dascomb* v. *Buffalo and State Line R. R. Co.*, 27 Barb. 221; *Butterfield* v. *The Western R. R. Co.*, 10 Allen, 532. Thus, if the deceased was apprised of the approach of the train by the noise, and ventured upon the track from a miscalculation of his danger, the error was his, and the company are not answerable for that erroneous calculation.

The seventh instruction should not have been changed by the insertion of the words "and recklessly," there being no evidence to justify such language. It is not proper that a court should countenance a jury in an evasion of the law, by bringing all cases where the injured party has been guilty of contributing negligence within the exception. The most that can be said under the evidence, in any view, is, that no signal was given, and that the railroad train was running at a great rate of speed. But in *The Indianapolis and Cincinnati R. R. Co.* v. *McClure*, *supra*, excessive speed was held not to justify a finding of willfulness or willingness to inflict the injury.

The twelfth instruction asked informed the jury that if Hunter's negligence contributed to his injury, and he knew or had reason to believe such fault would or might do so, he cannot recover. If the injury "resulted from the fault or negligence of both parties," Hunter could not recover; and his knowledge that such would be the result certainly could not change the rule. It would seem from the argument of counsel that they construe the instruction to import, that if Hunter did an act which he knew or had reason to believe would or might contribute to his injury, there can be no recovery.

The thirteenth instruction we are not prepared to sustain. A willingness to inflict the injury would perhaps render the

company liable, although the injured party might have avoided the injury by reasonable diligence. But the court gave this instruction in the eighth one given. We do not regard either as properly applicable to the evidence. So also of the eleventh and twelfth instructions given.

The thirteenth instruction might well have been more guarded. It is not clear that the rate of speed of a train in "public view," approaching a road crossing at a distance from a city, is material in enabling a prudent man to avoid collision; for if you reduce the speed, the train being in open view, the traveler attempting to pass before the cars may by an error of judgment be injured, unless the train be so far under the control of the engineer that he can absolutely stop it before reaching the crossing, a requirement which would forbid rapid transportation, in effect. A prudent man would permit a train in "public view" and very near to pass, before attempting to cross the iron path.

The fourteenth instruction assumed erroneously that there was proof of willingness to inflict the injury complained of.

The fifteenth instruction should have informed the jury that if Hunter by the exercise of ordinary care might have seen or heard the train approaching, he was not justified in encountering the risk of crossing before it.

Reversed, with costs; remanded for a new trial.

J. T. Dye and *A. C. Harris*, for appellant.

J. Hanna, *F. Knefler*, and *N. B. Taylor*, for appellee.

McEwen and Another *v.* The Jeffersonville, Madison, and Indianapolis Railroad Company.

Common Carrier.—*Bill of Lading.*—*Conditions as to Delivery.*—A. delivered to a railroad company at a station on its road a quantity of flour owned by him, which was there placed on the cars of said company, to be shipped to

B. at another station on said road, in pursuance of a contract between A. and B. for the sale of said flour by the former to the latter, to be so delivered on cars at said former station, and to be paid for on receipt of the bills of lading. At the time of said delivery, B. was insolvent, and A received from the station agent of said company, authorized to receive and forward freights and furnished with blank bills of lading, at the station where the flour was so delivered, a bill of lading containing, besides the usual clauses, a provision, inserted at the request of A., that said flour should be delivered to B. upon the presentation of a duplicate of said bill of lading, and received also a second bill of lading in usual form, marked "duplicate" across the face thereof, in which the clause in relation to presentation of duplicate was omitted by mistake of the agent. A. made his draft on B. for the purchase-money of the flour, and attached said duplicate thereto, and negotiated said draft to C., who in good faith paid value therefor, knowing the form, character, and contents of said original bill of lading, which was then indorsed and delivered by A. to C. as collateral security for the payment of said draft; and C. deposited said draft, with said duplicate attached, at the bank at which it was made payable, and the cashier of said bank presented the same to B. before the delivery of the flour to him, who failed and refused to pay said draft or any part of it, but accepted it by endorsement across the face thereof; and, three days of grace having been granted, said draft was protested for non-payment, and the next day C. produced said original bill of lading and said duplicate at the office of said railroad company, at the station to which said flour was to be shipped as aforesaid, and demanded said flour theron; but said company failed and refused to deliver the flour, having delivered it to B., who was insolvent, and so continued to be, and who had shipped the flour out of the State.

Held, that the railroad company was liable to C. for the loss occasioned him by the delivery of the flour to B.

APPEAL from the Bartholomew Common Pleas.

This was an action by McEwen and Jones, bankers of the city of Columbus, in Bartholomew county, against The Jeffersonville, Madison, and Indianapolis Railroad Company. The complaint alleges, that on the 20th day of August, 1867, H. W. Comstock & Co., of the city of Indianapolis, entered into a contract with B. F. Jones & Co. for the purchase of eight hundred barrels of flour, known as B. F. Jones & Co's. XXXX, at eleven dollars per barrel; the flour to be delivered on cars at Columbus, in Bartholomew county, Indiana, and to be paid for on receipt of the bills of lading; that under and pursuant to said contract and

agreement between said parties, said B. F. Jones & Co. delivered to defendant, who is a common carrier for hire, and whose line and route extends and runs from Jeffersonville in said State, *via* Columbus, to the city of Indianapolis, two hundred barrels of their said flour, at the said city of Columbus, which was placed on the cars of the defendant to be carried and shipped for said B. F. Jones & Co., the shippers and owners thereof, to said city of Indianapolis; that said H. W. Comstock & Co. had no interest in, or right to, said flour, until the purchase-money therefor was paid; that at the time of placing said flour on defendant's cars, to be shipped as aforesaid, said firm of H. W. Comstock & Co. was wholly and notoriously insolvent, and said B. F. Jones & Co., as such owners and shippers of said flour, to retain and hold the custody and control of said flour until the purchase-money therefor should be fully paid, at the time they delivered said flour to defendant, as aforesaid, requested the station agent of said defendant, at said city of Columbus, to make and execute a bill of lading therefor, containing, among the usual clauses, that the said flour should be delivered on presentation of duplicate; and on the delivery of said flour to defendant, as aforesaid, its said agent, under and in pursuance of the request of said B. F. Jones & Co., as aforesaid, with intention to secure the control and possession of said flour in said B. F. Jones & Co., as aforesaid, until the purchase-money for said flour should be paid, made and delivered a bill of lading therefor, to said B. F. Jones & Co., as the owners and shippers thereof, having the control and custody of the same, as aforesaid, wherein defendant agreed to deliver the said flour, without unnecessary delay, in like good order, to H. W. Comstock & Co., at Indianapolis, in said State, on payment of freight as per tariff of said company, and presentation of duplicate thereof, which bill of lading is as follows:

"COLUMBUS, August 24th, 1867.

"Received of B. F. Jones & Co., in apparent good order, except as below specified, to be transported on the J. M. and

I. Railroad, the under-named articles, marked as per margin, which we agree to deliver, without unnecessary delay, in like good order, to H. W. Comstock & Co., at the regular station at Indianapolis, on payment of freight as per tariff of said company, and presentation of duplicate hereof.

Marks.	Articles.	Weight.
B. F. Jones & Co.	200 barrels of flour.	.....
.....	On Cars	.....
City Mills.....	No. 3,017–672.	.....

J. R. Woodfill."

And said defendant, by its said agent, made and delivered to said B. F. Jones & Co. its second bill of lading, which its said officer marked in writing across the face of the same "duplicate," but which, in fact, was not a duplicate, inasmuch as the clause "and presentation of duplicate hereof" is left out by mistake of said agent, which will be seen by reference to said original bill of lading and said second bill of lading, marked duplicate, a copy of which is filed marked "B," said defendant intending by said clause, "and presentation of duplicate hereof," in said original bill of lading, to require and bind said defendant to hold said flour until said Comstock & Co. or other person should lawfully and properly present said duplicate bill of lading therefor, and not otherwise deliver the said flour to said Comstock & Co., or any other person; and on said 24th day of August, 1867, before the delivery of said flour at said city of Indianapolis, said B. F. Jones & Co. made and drew their draft on said H. W. Comstock & Co., of Indianapolis, for the sum of two thousand two hundred dollars, the amount of said flour consigned as aforesaid, and on account thereof, payable at Indiana Banking Company's Bank, at said city of Indianapolis, and immediately produced their said draft, with said intended duplicate bill of lading for said flour attached thereto, at the banking house of plaintiffs, who were doing a banking business, as aforesaid, for the purpose of negotiating the same, who then and there, in good faith, discounted the same and paid value therefor to said B. F. Jones & Co., on the faith of said bill of lading, the plaintiffs

knowing the form, character, and contents of said original bill of lading, which was then and there, as part of said transaction, endorsed and delivered by said B. F. Jones & Co. to plaintiffs, as collateral security for the payment thereof, and on the 24th day of August, 1867, said draft, with said duplicate bill of lading attached, was placed at said Indiana Banking Company's bank, at the city of Indianapolis, for collection, who, by their agent, W. W. Woolen, cashier, presented said draft, with said duplicate attached, on same day, to said H. W. Comstock & Co., who, on said 24th day of August, 1867, accepted it by endorsement across the face thereof, but failed and refused to pay the same, or any part thereof; and the same was duly protested for non-payment on the 27th of August, 1867.

That said H. W. Comstock & Co. were, at the time of said shipment, wholly insolvent, and have been continually since, and are now, wholly unable to pay said draft, or any portion thereof, and the same is wholly unpaid. Plaintiffs aver that in a reasonable time, to wit, on the 28th day of August, 1867, plaintiffs produced their said original and duplicate bill of lading for said flour, at the office of defendant, at the said city of Indianapolis, and demanded said flour on the same, but defendant failed and refused to deliver the same to plaintiff, or any part thereof; that defendant prior thereto, to wit, on the 26th of August, 1867, surrendered and delivered all said flour to said H. W. Comstock & Co., without presentation of said duplicate or original bill of lading, or other authority, and in violation of said bill of lading, who on the same day forwarded the same beyond the limits of the State of Indiana.

That said Comstock & Co. did not produce to defendant the original or duplicate bill of lading, or other authority to obtain said flour, and never had possession thereof; but without the production thereof, said defendant delivered and surrendered said flour to said Comstock & Co., without any authority whatever; that said Comstock & Co., were not the owners of the flour, or entitled to the possession there-

of; that it was of the value of three thousand two hundred dollars. Judgment demanded for four thousand dollars with other proper relief.

A demurrer to the complaint was filed and at first overruled, and an answer filed, but subsequently, upon a demurrer being filed to the third paragraph of the answer, the court overruled it to the answer and sustained it to the complaint.

ELLIOTT, J.—The contract of shipment, which is the basis of the complaint, is contained in the bill of lading, by which the appellee acknowledged the receipt of the flour from Jones & Co. and agreed to deliver it to Comstock & Co., at the regular station at Indianapolis, on payment of freight "*and presentation of duplicate hereof.*" The latter clause, which we have italicised, was inserted in the bill of lading by the appellee's agent, at the instance of Jones & Co. The reason for which was, as alleged in the complaint, that Jones & Co. had previously contracted the flour to Comstock & Co., to be delivered on cars on the appellee's railroad, and to be paid for on the receipt of the bill of lading. Comstock & Co. had in the meantime become insolvent, and Jones & Co. did not intend that the flour should pass to their possession until it was paid for. This they intended to guard by the insertion of a clause in the bill of lading, making it a condition to the delivery of the flour that Comstock & Co. should first present to the appellee the duplicate bill of lading. Jones & Co. did not forward the duplicate to Comstock & Co., but transferred it by indorsement, with a draft drawn on the latter for the price of the flour, which they negotiated with the appellants, by whom it, with the bill of lading attached, was forwarded to Indianapolis for collection. Comstock & Co. did not pay the draft on presentation, and consequently the bill of lading was not delivered to them; and, therefore, they could not present it to the appellee; but the latter delivered the flour without its presentation.

Comstock & Co. were the consignees of the flour, and, in the absence of any condition being annexed to the delivery, would have been entitled to its possession on its arrival at Indianapolis, by paying the freight. The question, therefore, as to the sufficiency of the complaint depends upon the proper meaning and legal effect of the clause of the bill of lading, "and presentation of duplicate hereof."

It is contended by the appellee's counsel that this clause in the bill of lading must be regarded as having been inserted for the benefit of the carrier, as a means of identifying the consignees; that the railroad company was responsible for the delivery of the flour to Comstock & Co., the consignees; and that in delivering it to them without the presentation of the duplicate bill of lading, the only risk incurred was that of the proper identity of the persons named as consignees. No direct authority is cited in support of this proposition; but it is claimed that it stands upon the same footing as the other provision in the bill of lading, "upon payment of freight," and it is insisted that it is settled by the authorities that this latter provision in bills of lading is always regarded as having been inserted for the benefit of the carrier, which he may disregard in the delivery of the goods to the consignee and look to the consignor for the freight. But this proposition is too broadly stated, and not sustained by the cases cited. In *Collins & Timberlake* v. *The Union Transportation Co.*, 10 Watts, 384, the goods were shipped by E. & D. Gratz, commission and forwarding merchants, for Collins & Timberlake, who were merchants in Lexington, Kentucky, and the owners of the goods, which were consigned to Hutchinson & Leslie, a commission and forwarding house in Pittsburgh, and to be delivered to them "upon the payment of freights." The goods were carried by The Union Transportation Company and delivered to Hutchinson & Leslie without the payment of the freight, who forwarded them to Collins & Timberlake, and they paid the freight to Hutchinson & Leslie. The latter became insolvent. The Union Trans-

portation Company then sued Collins & Timberlake for the freight, and it was held that they were liable. It is said in the opinion of the court, "that the stipulation in a bill of lading, for delivery on payment of freight, is introduced for the benefit of the consignor, or the party for whom the consignee is agent," and that "if the agent should be faithless, the loss should fall on those who trusted him, and they ought to bear it."

Barker v. *Havens*, 17 Johns. 234, is also cited. In that case the owner of goods shipped them on the plaintiff's vessel, to be carried from New York to Liverpool, to be delivered to C., the consignee, he paying freight, &c. The master delivered the goods to the consignee without receiving the freights, which the consignee subsequently refused to pay. The suit was brought against the consignor, the owner of the goods, and he was held liable for the freight. But it was said by SPENCER, C. J., who delivered the opinion of the court, that he should be clearly of opinion, "that if it appeared that the goods were not owned by the consignor, and were not shipped on his account, and for his benefit, the carrier would not be entitled to call on the consignor for freight." This, upon principle, would seem to be the proper rule in such cases. If the owner consigns the goods, for his own benefit, to his agent, and the latter refuses to pay the freight, though the carrier is not bound to deliver the goods to him until the freight is paid, still the owner of the goods should be liable. But if the consignee is the owner of the goods, and they are shipped for his benefit, it is his duty to pay the freight, and if it is so stipulated in the bill of lading, the carrier must look to him alone for the freight.

Shepard v. *DeBernales*, 13 East, 565, is cited in both the foregoing cases as a leading case on this subject, and accords with the opinion expressed above.

But the stipulation that the goods were to be delivered to Comstock & Co. upon the presentation of the duplicate bill of lading, does not rest on the same foundation as that for the payment of freight. It is true that an unconditional

consignment of goods to a consignee by name is *prima facie* evidence that he is the owner and entitled to the possession of them, but it is not conclusive, and in many cases the consignee is but the agent of the consignor and receives the goods for his benefit. It is the right of the shipper, or consignor, in naming a consignee, to subject the delivery of the goods to him to any condition deemed proper by the consignor; and if, upon the arrival of the goods at the place of destination, the consignee does not comply with the condition, the carrier may discharge his liability as such by storing the goods in a proper warehouse, subject to the order of the shipper. In such a case the carrier is the agent of the shipper, and his primary duty is "to observe the instructions of his principal; and when he disregards them, he voluntarily assumes a responsibility by which he must content himself to abide." *Johnson* v. *The N. Y. Central R. R. Co.*, 33 N. Y. 610.

In this case, the stipulation in the bill of lading that the flour should be delivered to Comstock & Co. upon the presentation by them of the duplicate bill of lading, was inserted at the instance of Jones & Co. for their benefit and protection. It constituted a condition to the delivery of the flour to Comstock & Co., that they should first present the duplicate bill of lading to the appellee, and without which the latter was not authorized to deliver the flour to them. The duplicate bill of lading was delivered to Jones & Co. by the agent of the appellee; it could not be in the possession of Comstock & Co. until it was delivered or transmitted to them by or through Jones & Co.; and until it was received by them they were not authorized to receive the flour. By the contract of sale, Comstock & Co. were to pay for the flour on presentation of the duplicate bill of lading; and as they had become insolvent, care was taken to have the bill of lading, with a draft for the price of the flour, presented to them before the arrival of the flour at Indianapolis. The draft was not paid, and the bill of lading was not, therefore, delivered to them; and if the appellee

had observed the condition annexed to the delivery of the flour, the appellants, as the assignees of Jones & Co., would have been protected from loss. The loss resulted from the wrongful delivery of the flour by the appellee, without requiring the production of the duplicate bill of lading. The delivery was in violation of the instruction of the consignor, and the appellee must suffer the consequences.

But it is contended that under the contract between Jones & Co. and Comstock & Co., as stated in the complaint, the right of property in the flour vested in Comstock & Co. as soon as it was placed on the appellee's cars at Columbus, and that they were, therefore, entitled to its possession on its arrival at Indianapolis. We do not think so. Had the bill of lading stipulated for the delivery of the flour, under the contract of sale, to Comstock & Co. unconditionally, on its arrival at Indianapolis, the right of property would undoubtedly have vested in them, subject only to the right of Jones & Co. or their assigns of stoppage *in transitu*, before delivery. But as between Jones & Co., the consignor, and the carrier, it was the privilege of the former to annex a condition to the shipment and delivery of the flour to Comstock & Co. by which the former would retain the control of the possession. It is conceded that if the shipment had been made subject to the order of Jones & Co., though intended to be applied to the contract with Comstock & Co., the latter could not have claimed possession without the order of Jones & Co.; and we think that precisely the same result was effected by the stipulation that Comstock & Co. should present the duplicate bill of lading before receiving the flour, and then withholding the bill of lading from them until the flour should be paid for. See Angell on Carriers, 424, § 511. The discount of the draft by the appellants and the assignment and delivery to them of the duplicate bill of lading by Jones & Co. amounted to a sale of the flour to the appellants, in trust, to be delivered to Comstock & Co. if they paid for it on presentation of the draft and duplicate bill of lading, or in case they refused,

then to sell the flour and pay the draft. *Allen* v. *Williams*, 12 Pick. 297; *The Bank of Rochester* v. *Jones*, 4 N. Y. 497.

It is claimed, however, that when Comstock & Co. accepted the draft, they were entitled to the possession of the flour. By the terms of the contract, as stated in the complaint, the draft, it being accompanied by the bill of lading, was payable on presentation, and Comstock & Co. were not entitled to three days of grace; and the error of the appellant's agent in allowing that time before protesting the draft for non-payment did not entitle Comstock & Co. to receive the flour without the duplicate bill of lading. The appellants were secure in their lien on the flour so long as they withheld from Comstock & Co. the duplicate bill of lading, if the appellee had not violated the stipulation requiring the production of the duplicate before the delivery of the flour.

The third paragraph of the answer was manifestly bad. It admits, in effect, that the agent who signed the bill of lading was the appellee's station agent at Columbus, where the flour was shipped, with authority to receive and forward freights, which necessarily included the power to make and sign bills of lading and receipts for freights shipped at that point. It was the right of the shipper to name the consignee and annex such conditions as he deemed proper to the delivery to him of the goods shipped; and the fact that the agent was furnished blank bills of lading which did not specify any condition to the delivery of goods shipped, could not limit the power of the agent in that respect.

Judgment reversed, with costs; and the case remanded, with directions to the circuit court to overrule the demurrer to the complaint and sustain it to the third paragraph of the answer.

F. T. Hord, for appellants.

S. Stansifer, *T. A. Hendricks*, *O. B. Hord*, and *A. W. Hendricks*, for appellee.

The Toledo, Wabash, and Western Railway Company *v.* Hammond.

Special Verdict.—If a jury merely find the facts covering all the issues being tried, in answer to interrogatories propounded by the court, this is substantially a special verdict.

Common Carrier.—*Place of Delivery.*—*Railroad.*—Where a railroad company is employed by a person to transport his baggage for hire from A. to B., stations on said company's road, and does not deliver the goods to him at B., but carries them to C., another station on said road, and there stores them in the company's depot baggage-room, the liability of the company as a common carrier is not thereby ended; and if the goods are stolen from the company at C. and thereby lost to said owner, the company will be liable to him for the damage sustained by him by reason of the failure to deliver the goods at B.

Same.—*Baggage.*—Articles for use as baggage at the end of a journey or during a temporary stay at a particular place, are as properly baggage as those actually used in the transit, and may include an opera glass, though the entire journey be made at night.

APPEAL from the Miami Circuit Court.

Gregory, J.—Hammond sued the railway company as a common carrier, for a trunk and the contents thereof, shipped at Toledo, Ohio, for Peru, Indiana. There was filed with the complaint a bill of particulars of the contents of the trunk. The defendant moved to strike out certain specified items therein for the alleged reason that they were not proper articles of baggage. The court overruled the motion; and this is complained of as erroneous. It is enough to say, that there is no allegation in the complaint that the trunk and its contents were delivered to the appellant as baggage.

The next point made is, that the court improperly overruled the appellant's motion for a *venire de novo*.

The court was asked to instruct the jury to find a special verdict. The court, on its own motion, sent to the jury interrogatories, covering the entire issues in the case. The jury answered these interrogatories. It is claimed that this is not a compliance with the provisions of the code.

Sections 335 and 336 of the code are as follows: "The

verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving judgment thereon to the court."

"In all actions, the jury, unless otherwise directed by the court, may, in their discretion, render a general or special verdict; but the court shall, at the request of either party, direct them to give a special verdict in writing upon all or any of the issues; and in all cases, when required by either party, shall instruct them, if they render a general verdict, to find specially upon particular questions of fact to be stated in writing. This special finding is to be recorded with the verdict."

The only substantial difference between a "special verdict" and a "special finding," under the provisions of the code, is this: the "special verdict" must cover the issues, or some one or more of them; the "special finding" may embrace only a particular question pertinent to, but not covering, any of the issues, although it may be controlling. Any finding of a jury that covers an issue is a verdict. This is in harmony with the previous rulings of this court.

In *Paine* v. *The Lake Erie and Louisville R. R. Co.*, 31 Ind. 283, the court below, of its own motion, required the jury, unconditionally, to answer certain interrogatories, which they answered without returning a general verdict. It was held by this court, that the answers could stand as a special verdict.

It is not necessary to a special verdict that it be in any particular form; all that is required is, that the facts found, covering the issue, should be stated, leaving the conclusion of law thereon to the court.

In the case at bar, the court below committed no error in overruling the appellant's motion for a *venire de novo*.

There was a conflict in the evidence as to whether the trunk was to be carried by the appellant to Peru or to Lafayette. The appellant asked the court below to instruct

the jury, that, "if the company is not liable in this case as a common carrier; that is, if the goods were not lost in transit between Toledo and Lafayette, the plaintiff cannot recover, and your verdict should be for the defendant." The court refused to give this instruction. The court had charged the jury, that "in this case the suit is against the railway company as a common carrier, and if you find that the company carried the goods safely to their destination, and, in the absence of the plaintiff, securely stored them in her depot baggage-room, then the liability of the company as a common carrier ceased, and Hammond cannot recover for the negligence of the company in keeping the baggage as warehouseman."

The jury found, as they well might, under the evidence, that the trunk was, under the contract of shipment, to be delivered to the appellee at Peru. If in violation of this contract the appellant took it to Lafayette, and there stored it in her depot baggage-room, her liability of common carrier was not thereby terminated. The court was right in refusing to give the instruction asked.

At the instance of the appellee, the court instructed the jury, that, "if the plaintiff employed the defendant as a common carrier for hire to transport his baggage from the city of Toledo, Ohio, to Peru, Indiana, the defendant was bound to deliver the baggage at Peru, Indiana, and if the defendant did not do so, but carried the baggage past Peru to Lafayette, Indiana, and the baggage was stolen from the defendant at Lafayette, whereby it was lost to the plaintiff, the defendant is liable to the plaintiff for whatever damage he may have sustained by reason of the defendant's failure to deliver the baggage at Peru, Indiana."

It is claimed that this is the counterpart of the instruction refused; that if one was refused, the other ought to have been. This latter instruction goes upon the hypothesis that it turns out in evidence that the defendant was employed as a common carrier for hire to transport the baggage to Peru. This instruction was right. It does not ignore the

evidence tending to prove that the trunk was shipped to Lafayette and not to Peru.

It is urged that the court erred in permitting the appellee to testify as to the value of the opera glass mentioned in the bill of particulars.

It is argued that the opera glass was not properly baggage, and therefore the common carrier, without knowledge of the fact that it was in the trunk, would not be liable for the loss thereof.

It is true, that it is well settled, that merchandise which one carries in a trunk without the knowledge of the carrier is not protected as baggage, and if lost without the express fault of the carrier, he is not liable. *Great Northern Railway Co.* v. *Shepherd*, 9 Eng. Law & Eq. 477; *Collins* v. *Boston and Maine R. R.*, 10 Cush. 506.

But baggage is defined to be "such articles of apparel, ornament, &c., as are in daily use by travelers, for convenience, comfort, or recreation." 1 Bouvier's Law Dic. 180.

In *Doyle* v. *Kiser*, 6 Ind. 242, the learned judge speaking for the court says, "The articles of property treated as baggage, according to the decisions of different courts, may be clothing, traveling expense-money, a few books for the amusement of reading, a watch, a lady's jewelry for dressing, &c."

It is said in Bouvier, *supra*, "From analogy to the foregoing articles, it will be obvious that the term baggage must comprehend an almost infinite number and variety of articles not enumerated here."

An opera glass is as useful to the traveler as a "few books for amusement," or more so.

That the trip from Toledo to Peru was made in the night, can make no difference. Articles for use as baggage at the end of the journey or during a temporary stay at a particular place are as properly baggage as those actually used in the transit. We think the court below committed no error in allowing the evidence to go to the jury.

It is insisted that the evidence does not support the verdict. It is admitted that there is a conflict in it, but it is claimed

that the preponderance is so strongly in favor of the appellant that the court erred in overruling the motion for a new trial. We do not think so. Hammond, the appellee, swears positively that he shipped the trunk at Toledo for Peru. He was going there himself. Unlike the baggage-master, his attention was not divided between that and a large number of other trunks. Moreover, it would be perfectly natural that Hammond should have his mind fixed on Peru, the place of his destination; but the baggage-master would only have his mind called to the place by a single statement from the shipper. The chances are two to one that Hammond was right, and the other witnesses were wrong. But be this as it may, we cannot, under the rule of law on the subject, interfere with the finding of the jury, sanctioned as it is by the action of the court in which the case was tried.

Judgment affirmed, with costs.

W. Z. Stuart, for appellant.

O. Blake, for appellee.

MYRICK *v.* THE BOARD OF COMMISSIONERS OF MONTGOMERY COUNTY.

COUNTY TREASURER.—*Commission for Disbursing School Tax.—Statute Construed.*—The provision of section 107 of the school law (3 Stat., Davis, 461) allowing to county treasurers a commission of one per cent. "on the amount of school tax disbursed," refers not only to the tax levied by the State, to be used exclusively for tuition, but also to that levied by the townships, under section 12 of said act, to be expended for building school houses, &c.

SAME.—*Taxes Returned Delinquent by Mistake.*—Where a county treasurer by mistake returned as delinquent certain taxes which had been paid, and such taxes, with the ten per cent. penalty added thereto, were carried to the tax duplicate for the next year; and said treasurer on his final settlement with the county board, paid over, under protest, the amount of said penalty, never collected by him:

Myrick *v.* The Board of Commissioners of Montgomery County.

Held, that he was entitled to recover, in an action against said board, the amount so paid under protest.

APPEAL from the Montgomery Common Pleas.

Suit by the appellant against the appellees. The complaint consisted of two paragraphs. The first alleged, that in the years 1867 and 1868, the appellant was treasurer of Montgomery county, duly qualified and acting as such; that as such treasurer he disbursed special school tax in 1867 to the amount of fourteen thousand two hundred and forty-one dollars, and in 1868 to the amount of fifteen thousand seven hundred and five dollars, for which he was and is entitled by law to one per cent. for his fees for so disbursing said tax, which said board refused to allow him, in his final settlement, amounting to three hundred dollars. The second paragraph alleged, that said board was indebted to him in the sum of one hundred dollars for so much money paid by him to said board against his protest, in his final settlement with said board, the same being ten per cent. penalty added to taxes amounting to one thousand dollars returned delinquent, which had been paid, and returned delinquent through mistake of plaintiff.

A demurrer to both paragraphs of the complaint for want of sufficient facts was sustained, and the appellant excepted. The appellant failing to answer, judgment was rendered against him for costs.

FRAZER, J.—The one hundred and seventh section of the school law (3 Stat., Davis, 461) allows to county treasurers one per cent. "on the amount of school tax disbursed." A question in the case before us is, whether by this provision the treasurer is entitled to the commission of one per cent. upon taxes levied by the townships for building school houses, &c., authorized by section twelve of the same act. This is a question of construction.

The general school law, of which the sections above referred to are a part, provides for only two kinds of taxes for school purposes; one levied by the State, to be used ex-

clusively for tuition; the other to be levied by the townships and to be expended for buildings, furniture, apparatus, fuel, and other incidentals. The first of these taxes is denominated "school revenue for tuition" (sec. 2), but elsewhere in the act called "school revenue" (secs. 116, 117, 118, 123). It is also called, in one instance (sec. 111), "school tax." The other is denominated "the special school revenue" (sec. 12), though it is elsewhere called in the act "special school tax" (secs. 13, 17) and "special tax for school house erection" (sec. 21). Both taxes are for school purposes, and each can properly be called a "school tax;" and we are of the opinion that the use of that language in sec. 107 of the act was intended to comprehend both. Such is the natural import of the words; and it is impossible to imagine a reason which could have influenced the legislature to enact that the treasurer should be allowed a commission upon one of them for disbursing it, and be denied it upon the other. The use of the same words in a single instance in the same act, to designate only the tax levied for tuition, has been noticed, but it is not, in our opinion, convincing that they were used in the same sense in the section which we are required to construe. Nor can we discover, what is suggested in argument for the appellee, that the context indicates that the words as used in sec. 107 refer only to tax for tuition. The sections preceding and succeeding it do not relate at all to either of these taxes.

We are led to the conclusion, therefore, that the court below erred in sustaining the demurrer to the first paragraph of the complaint.

The treasurer, by mistake, returned as delinquent taxes to the amount of one thousand dollars which had actually been paid. These taxes were, with a penalty of ten per cent. added thereto, carried to the tax duplicate of the next year. Of course, this penalty could not be and was not collected by the treasurer. The question presented by the demurrer to the second paragraph of the complaint is, whether

the treasurer was, nevertheless, liable for it. It is too plain to need much consideration. The officer could not be required to account for money which never did and never could come to his hands. If he actually kept the county out of one thousand dollars of its money, by returning taxes as delinquent where they were not delinquent, he was liable upon his bond for the misfeasance. But that is a different affair.

Reversed, with costs, and remanded, with direction to overrule the demurrer.

P. S. Kennedy and *R. H. Galloway*, for appellant.

A. Thompson and *B. T. Ristine*, for appellee.

Lamb, Treasurer, *v.* Rawles, Executor.

Tax.—*Statute Construed.*—The word "demands" in the third clause of the twenty-third section of the act to provide for the valuation and assessment of real and personal property and the collection of taxes, &c., 1 G. & H. 68, relates only to such demands as the law will recognize and enforce; and no contract by which a liability is created after the first day of January can relate back so as to make the creditor liable to be taxed for that year for such demand.

APPEAL from the Fountain Circuit Court.

Elliott, J.—This was a suit commenced by Robert Hetfield against William Lamb, treasurer of Fountain county, to enjoin the collection of certain taxes, claimed to have been illegally assessed against Hetfield.

During the pendency of the suit, Hetfield died, and it was revived in the name of David Rawles, his executor.

On the final hearing, a perpetual injunction was decreed, in accordance with the prayer of the complaint. Lamb appeals.

The only question made in the case is, that the evidence does not sustain the finding and judgment of the court.

The facts in the case are presented by an agreement made by the parties in the circuit court; which, in substance, is as follows: Some time in November, 1866, Hetfield *orally* agreed to sell his farm of three hundred and twenty acres of land in Fountain county, at forty dollars per acre, to one John Death. No writings were then made, but it was understood between them that the agreement should be consummated at some future date. On the 3d day January, 1867, Death paid Hetfield five thousand dollars on account of the purchase, and executed to the latter his notes amounting to eight thousand eight hundred and eighty-nine dollars, for the residue, payable in four equal annual instalments, without interest; the interest having been calculated from November, 1866, and added to the amount as a part of the principal included in the notes. After the oral agreement in November, 1866, and before the 1st of January, 1867, Death came to Hetfield and proposed to let him have a note for twelve hundred and fifty dollars, on one Carpenter, and twelve hundred and fifty dollars in money, to be held by Hetfield, and to be accounted for when the sale of the land should be consummated. The trade was consummated on the 3d of January, 1867, when the five thousand dollars just referred to were allowed as a payment on the land, notes executed for the balance as before stated, and at the same time Hetfield executed to Death a title bond, binding him to make a deed for the land, when the notes given for the residue of the purchase-money should be paid.

The note for twelve hundred and fifty dollars on Carpenter was given in by Hetfield to the assessor, and properly charged to him on the tax duplicate for 1867. Hetfield had invested the twelve hundred and fifty dollars in money, received from Death, in other real estate, before the 1st of January, 1867, and consequently did not have it on hand at that date.

Prior to the 1st of January, 1867, Hetfield sold to Death a lot of sheep and some oats and hay, then on the farm,

and permitted the sheep to remain there and be fed with the oats and hay. Hetfield remained in possession of the farm until after January 3d, 1867. The farm was assessed on the tax duplicate for 1867 against Hetfield, though by agreement between him and Death, the latter paid said tax. In addition to the other taxes assessed against Hetfield for 1867, about which there is no controversy, he was charged on the duplicate for that year, without his consent, with twelve thousand dollars, the proceeds of the sale of the farm; on which the taxes levied amounted to four hundred and sixty-three dollars and twenty cents. The duplicate containing said tax was in the hands of Lamb as treasurer, and he was about to proceed to collect the amount by a levy and sale of Hetfield's personal property, and would have done so, but for the restraining order of the court.

It is provided by statute, that "every person shall be listed in the township where he resides when the enlistment is made, for all personal estate owned by him, on the 1st day of January of the year in which the enlistment is made," &c. 1 G. & H. 71, sec. 13. And by the 23d section of the same act, "personal estate" is made to include, among other things, "the value of all demands against any person or body corporate, either within or without this State." The question here is, do the facts stated show that Hetfield, on the first day of January, 1867, held a demand against Death for the price of the farm, or any part of it? We think not. The word "demands," as used in the statute, must be construed to relate only to such legal demands as the law will recognize and enforce. Here it does not appear that Death had either purchased or agreed to purchase the farm until after the 1st of January, 1867. It is stated that Hetfield, in November, 1866, agreed to sell the farm to Death at forty dollars per acre; but it does not appear that Death agreed to purchase it. There does not seem to have been any agreement or understanding between them, at that time, as to the mode or time of payment. The facts stated simply amount to this: Hetfield proposed to sell the farm

at forty dollars per acre; Death did not then agree to make the purchase, but it was understood by both parties that an agreement for its purchase would be consummated at some future time, which, in fact, did occur on the 3d of January, 1867. It seems evident that the terms of the contract were not settled or agreed upon between the parties until the 3d of January, 1867. So that, aside from any question presented by the statute of frauds, there was no definite or binding agreement existing between them in reference to the sale of the farm on the first of January, 1867; and it follows that Hetfield, on that day, held no legal demand against Death on account of the sale of the farm, no such sale having been then made. The subject had been talked of between the parties, and it may be inferred from the facts stated that both of them confidently expected that a contract would be consummated at some future time, but it did not exist on the 1st of January, 1867.

But it is argued that as interest was computed on that part of the purchase-money for which notes were given, from November, 1866, the consummation of the contract on the 3d of January, 1867, related back to November, 1866, and in legal effect, rendered the contract as of that date. This proposition is untenable, as applied to the question before us.

To make Hetfield liable to the assessment, he must have held a legal claim against Death on the 1st of January, 1867; and no subsequent contract between them by which a liability was created, could be made to relate back so as to make him liable to be taxed for what, in fact, he did not possess on that day.

The finding of the court below is also objected to on the ground that it does not appear that Hetfield had paid the taxes legally assessed against him for 1867, and *Roseberry* v. *Huff*, 27 Ind. 12, is cited. That case is not in point here. There it affirmatively appeared that there were legal taxes due against Huff, which he suffered to be returned as delinquent for several years; and the question in the case grew

out of the interest and penalties charged upon them. Here it does not appear that the taxes legally assessed against Hetfield were unpaid. Indeed, it may be reasonably inferred from the record that they were not.

Judgment affirmed, with costs.

T. J. Davidson, for appellant.

W. H. Mallory, for appellee.

SHANNON *v.* BAKER, Governor.

33	390
151	561

TITLE TO ELECTIVE OFFICE.—*Contest.*—*Commission.*—A person duly elected by popular vote to an office under the constitution and laws of this State has the right to the possession of such office at the commencement of the term for which he was elected, notwithstanding a contest of such election may be pending; and a commission issued to him after the termination of such contest should be made for the term for which he was elected (commencing, not at the date of the termination of the contest, but at the date at which he was entitled to the possession of the office).

APPEAL from the Marion Circuit Court.

GREGORY, J.—Shannon sued out an alternative mandate against Baker, to compel the issuing of a commission by the latter as Governor, to the former, for the office of clerk of the Laporte Circuit Court for the term of four years from the 10th of May, 1870. The cause was submitted to the court below on an agreed statement of facts. Judgment was rendered against Shannon, from which he appeals.

At the general election of 1868, Shannon the appellant, and one Charles Spaeth were candidates for the office of clerk of the Laporte Circuit Court, Shannon being then the clerk, and his commission extending till May 5th, 1869, and until his successor should be elected and qualified. Shannon was by the board of canvassers declared to be duly elected. Within the proper time, Spaeth contested the elec-

tion on various grounds. On the 13th of November, 1868, the contest was decided by the board of commissioners in favor of Shannon, and Spaeth appealed to the circuit court. The cause was unavoidably continued in the circuit court until the April term, 1870, when, by agreement of the parties, the appeal was, on the 10th day of May, 1870, dismissed.

On May 17th, 1870, Shannon presented to the Governor a duly certified copy of the record and proceedings, and requested the Governor to commission him for four years from the time of the termination of the contest; which the Governor declined to do, but was willing to issue the commission for four years from the 5th day of May, 1869; and the question in controversy was voluntarily submitted to the court.

The eligibility of Shannon and the good faith of all the proceedings is also admitted.

The question is, when did Shannon's term of office commence under his election in 1868? It is claimed, that the contest suspended his right to the office during its pendency, and that his term therefore commenced at the termination of the contest.

It seems to be settled, that where the title to an office is derived from popular election, the commission of the executive is not necessary to the right to exercise the duties of such office. *State, ex rel. Cornwell,* v. *Allen,* 21 Ind. 516; *Glascock* v. *Lyons,* 20 Ind. 1.

This principle seems to be recognized by the code, in which it is provided, that "in every case contesting the right to an office, judgment shall be rendered upon the rights of the parties, and for the damages the relator may show himself entitled to, if any, to the time of the judgment. If judgment be rendered in favor of the relator, he shall proceed to exercise the functions of the office after he has been qualified as required by law." 2 G. & H. 324, secs. 754–5.

There is no provision in the constitution or laws of this State requiring a commission before a person duly elected

by popular vote can qualify and enter upon the discharge of the duties of an elective office.

The constitution provides, that "whenever it is provided in this constitution, or in any law which may be hereafter passed, that any officer, other than a member of the general assembly, shall hold his office for any given term, the same shall be construed to mean that such officer shall hold his office for such term, and until his successor shall have been elected and qualified;"—not elected, commissioned, and qualified, but elected and qualified.

It seems clear to us, that, if Shannon was duly elected, at the October election in 1868, clerk of the Laporte Circuit Court, his own successor, he had a right to qualify and enter upon the duties of the office under such election at the expiration of his former term.

Under the act of May 4th, 1852, any elector can contest the election of any person declared elected by popular vote to any office, for whom such elector was entitled to vote. 1 G. & H. 316, sec. 1.

No security or indemnity of any kind is required of such contestor. It is argued, that the thirty-eighth section of the election law suspends the right of a person duly elected to an office of entering upon the discharge of its duties. That section is this: "When any person is elected to an office by the voters of a county, not to be commissioned by the governor, and such election is not contested, the clerk of the circuit court shall, after ten, and within twenty days from the time the board of canvassers have made their return, make out and deliver on demand, to such person, a certificate of his election; and in case where any officer is to be commissioned by the governor, he shall make out a statement under his hand and the seal of his court, specifying the number of votes given to each person for each office, and who has been declared elected, and shall transmit the same by mail to the secretary of state, within the time aforesaid." 1 G. & H. 312.

It is clear to our minds, that there is nothing in this sec-

tion affecting the right to the possession of an office by one having such right. It is not the certificate of the clerk in one case, nor of the commission issued by the governor in the other, that confers the right. Such certificate and commission are only evidence of such right. It may be that the clerk is not bound to issue the certificate, or to certify the state of the vote, in case of contest, as an official duty; but there is nothing in this section which would prevent the person elected from procuring all the evidence in his power, to establish his right even to the commission, and certainly nothing which would prevent him from asserting his right to the office.

We conclude, therefore, that a person duly elected by popular vote, to an office under the constitution and laws of this State, has the right to the possession of such office at the commencement of the term for which he was elected, notwithstanding a contest of such election may be pending.

Shannon's second term commenced, under the agreed state of facts, on the 5th of May, 1869; his voluntary failure to assert his right could not extend the term for which he was elected.

Judgment affirmed, with costs.

J. B. & W. Niles, for appellant.

H. C. Newcomb, *J. L. Mitchell*, and *W. A. Ketcham*, for appellee.

Walker *v.* The City of Evansville.

City of Evansville.—*Charter.*—*Salaries of Officers.*—The charter of the city of Evansville provides, that the mayor "shall receive annually a salary, to be fixed by ordinance or by-law, and paid out of the city treasury by quarter-yearly instalments; and after the first ordinance fixing such salary shall take effect and be in force, no ordinance decreasing such salary shall take effect until the next regular election for mayor, or until the office of mayor shall become vacant." The record of the proceedings of the com-

mon council shows that, at a certain date, "on motion, the council proceeded to fix the following salaries, viz.: for" A. B., "mayor, per annum, three thousand dollars;" and A. B. was paid that amount while he remained mayor. After the election and qualification of his successor, the latter was also paid the same sum for a portion of his term of office, when the common council passed an ordinance which provided, "that there shall be allowed to the several officers of the city and appointees of the common council of the city, hereinafter mentioned, the following salaries to be paid monthly: to the mayor per year, two thousand dollars," &c.

Held, that said allowance of three thousand dollars was a fixing by by-law of the salary of mayor, and not simply an allowance to A. B.

Held, also, that the ordinance so passed after the election and qualification of the successor of A. B., decreasing the salary of mayor, could not have any effect on the salary of said successor.

APPEAL from the Vanderburgh Circuit Court.

RAY, C. J.—On the 9th day of July, 1869, the parties to this action submitted to the court below an agreed case, from which it appears that in April, 1868, the appellant was elected mayor of the city of Evansville, and was afterwards duly qualified as such; that he still performs the duties of said office; that at a session of the common council of said city, on the 17th day of April, 1865, the following proceedings were had concerning the salaries of mayor and clerk: for W. Baker, mayor, three thousand dollars per annum; for A. McGraff, clerk, fifteen hundred dollars per annum; that no change in the amount of salary to be paid to the mayor was made prior to the election and qualification of the appellant; that on the 31st day of May, 1869, the common council passed an ordinance concerning the duties and salaries of the city officers, section six of which is as follows: "That there shall be allowed to the several officers of the city and appointees of the common council of the city, hereinafter mentioned, the following salaries, to be paid monthly: To the mayor per year, two thousand dollars; to the clerk, per year, fifteen hundred dollars;" whereupon the appellant filed with the city clerk a protest against the passage of said ordinance; that the appellant, up to the 1st day of April, 1869, received his salary from the appellee at the rate of three thousand dollars per year; that upon the

basis of the salary of mayor being still three thousand dollars per annum, there is due the appellant from April 1st, 1869, to July 1st, 1869, seven hundred and fifty dollars; that under the ordinance of the 31st of May, 1869, the appellant is entitled to five hundred dollars, which the appellee is willing to pay, there being no controversy except over the difference between the two amounts, to wit, two hundred and fifty dollars.

The cause was heard by the court, and judgment was rendered for defendant. The plaintiff excepted and moved the court for a new trial, for the reasons, first, that the finding of the court was contrary to law; second, that the finding of the court was not supported by the evidence. The motion was overruled, to which plaintiff excepted.

There is a provision in the city charter, that the mayor "shall receive annually a salary to be fixed by ordinance or by-law, and paid out of the city treasury by quarter-yearly instalments; and after the first ordinance fixing such salary shall take effect and be in force, no ordinance decreasing such salary shall take effect until the next regular election for mayor, or until the office of mayor shall become vacant." Local Laws of 1846–7, p. 29, sec. 63.

The record is as follows: On the 17th day of April, 1865, "Councilman Orr was appointed president *pro tem.*, and on motion the council proceeded to fix the following salaries, viz.: For W. Baker, mayor, three thousand dollars per annum; for A. M. McGraff, clerk, fifteen hundred dollars per annum." The appellee insists that this was not the fixing of a salary to the office of mayor, but simply an allowance to W. Baker. But the record declares the sum was fixed as a salary, and under it while Baker remained mayor he was paid that salary; and after the election of the appellant, the same sum was paid to him until the passage of the ordinance of 1869. The city charter provides for a salary payable quarterly for each year, and does not authorize *annual* allowances to be substituted. Again, the city charter imposes it as a duty upon the council to fix by

ordinance or by-law such salary. With the action of the council in April, 1865, before us, are we to charge the members of that body with a neglect of official duty?

In the case of *Lisbon* v. *Clark*, 18 N. H. 234, the court held: "If a town is authorized by the legislature to pass a particular by-law, and no particular form is prescribed in which the law shall be engrossed, any form of words is sufficient to constitute such a by-law, provided enough is contained therein to signify the will of the town that the by-law exists, and to indicate its terms and the objects to which it should apply."

In the case of *Whitlock* v. *West*, 26 Conn. 406, the validity of a by-law, which reads as follows, was questioned: "Voted, that all cattle shall be restrained from going at large on the highways and commons in said town." The by-law was sustained, and the court held, "The construction of by-laws of a town, as they are more inartificially expressed than other laws, should be reasonable and such as to give effect to every part."

It seems clear that the only force this action of the council can have is as a by-law fixing the salary of the mayor and the clerk, and that no ordinance decreasing such salary can have any effect until a vacancy or a new election occurs in that office. The court below having otherwise determined this question, the judgment is reversed, and the cause remanded for a new trial.

FRAZER, J.—It seems to me that the fact is apparent that the council did not fix the salary of the office of mayor generally, but merely the salary of Baker as such. This, though not what the charter required, was what was actually done. From this I conclude that the court below did not err.

A. Iglehart and *C. Denby*, for appellant.

J. M. Shackelford and — *Parrett*, for appellee.

PRIEST *v.* FARNEMAN, Treasurer.

SOLDIERS.—*Bounties.*—*County Commissioners.*—*Order of Construed.*—The board of commissioners of a certain county made an order appropriating one hundred and fifty dollars, to be paid out of the military fund thereafter to be created by taxation, to each person who had then, or might thereafter, volunteer in the army of the United States, in obedience to the proclamation of the President calling for volunteers, provided said volunteer was duly credited to the quota of said county; and the order contained a provision, "that if any one so mustered into the service of the United States shall have received from the county or any township thereof any sum, the same shall be deducted from the above amount; and if he shall have received a sum equal to or more than one hundred and fifty dollars from the county or any township on account of such volunteering, then, in that event, he shall receive nothing from this appropriation."

Held, in a suit for a mandate to compel the treasurer of said county to pay a warrant issued under said order to a volunteer, that money paid to said volunteer by the citizens of a township in said county out of a fund raised by voluntary contribution, to induce him to volunteer and allow himself to be credited to that township, did not come within said provision of said order.

APPEAL from the Carroll Circuit Court.

GREGORY, J.—This is a proceeding by mandate, to compel the appellee, as treasurer of Carroll county, to pay two warrants, drawn by the auditor of that county, for seventy-five dollars each, dated the 15th of March, 1864, in favor of one Robert F. Priest, one due in one, and the other in two years from date, with interest, payable out of the proceeds of the military fund collected by taxation. The warrants were assigned to the appellant.

There are some questions raised on the pleadings and evidence, but the main question arises on the motion for a new trial, on the ground that the finding was not sustained by the evidence. There does not seem to be any conflict in the testimony. The giving of the warrants, the fact that there was a demand on the treasurer, and that he had in his hands a fund of six thousand dollars on which the warrants were drawn, are not disputed. The only ground of defense attempted at the trial was, that the payee had received one hundred and fifty dollars from certain citizens of Jackson

township, in Carroll county, to induce him to volunteer in the military service of the United States, and allow himself to be credited to that township, so as to relieve it from the then pending draft.

The facts as shown in evidence on this part of the case are about these: certain citizens of Jackson township by voluntary contribution had raised a fund with which they were procuring volunteers, to be credited to their township. They called on the payee and offered him one hundred and fifty dollars to be credited to their township, telling him that in addition he would be entitled to the bounty given by the county. He accepted the proposition and received the one hundred and fifty dollars. And as soon as he could procure the proper certificate, he presented it to the auditor, who issued to him the warrants in question. The order of the board of commissioners of Carroll county, under which the warrants were issued, was made on the 11th of February, 1864, and appropriated one hundred and fifty dollars, to be paid out of the military funds thereafter to be created by taxation, to each person who had then, or might thereafter, volunteer in the army of the United States, in obedience to the proclamation of the President calling for volunteers, provided such volunteer was duly credited to the quota of Carroll county. The order contains this provision: "that if any one so mustered into the service of the United States shall have received from the county, or any township thereof, any sum, the same shall be deducted from the above amount; and if he shall have received a sum equal, or more than one hundred and fifty dollars from the county or any township on account of such volunteering, then, in that event, he shall receive nothing from this appropriation."

It is clear to our minds, that the money paid by the citizens of this township out of a fund raised by voluntary contribution does not come within this provision. It was not the money of the township, and by no means could the township or county be made liable to refund to these citi-

zens the money so advanced. See *Oliver* v. *Keightley*, 24 Ind. 514; *The Board of Com'rs of Miami County* v. *Bearss*, 25 Ind. 110.

The evidence did not sustain the finding, and the court erred in overruling the motion for a new trial.

The proper issue was formed by the denial of the second paragraph of the answer. And under that issue, proof of payment by citizens of Jackson township out of funds raised by voluntary contribution was not proper evidence, and ought to have been rejected.

Judgment reversed, with costs; cause remanded, with directions to grant a new trial, and for further proceedings.

R. H. Milroy and *J. H. Gould*, for appellant.

B. B. Daily, for appellee.

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127 355

38 399
156 255

BRATNEY, Administrator, *v.* CURRY, Executor.

DECEDENTS' ESTATES.— *Widow.—Allowance of Three Hundred Dollars.*—If the allowance of three hundred dollars which the statute (1 G. & H. 295, sec. 21) makes to a surviving wife out of the personal estate of her deceased husband, before any distribution, be not claimed during her lifetime, it goes to her personal representative.

SAME.—*Expense of Resisting Contest of Will.*—A decedent's estate is chargeable with the reasonable expenses of the executor in an unsuccessful effort made by him in good faith to resist a contest of the will of the decedent.

APPEAL from the Monroe Common Pleas.

FRAZER, J.—The appellee was, by the last will of James Bratney, Sr., deceased, appointed executor thereof; letters testamentary accordingly were issued to him, and he qualified and entered upon his duties as such. Subsequently, the will was duly contested, and the result was, that it was declared invalid by the proper court. The widow of the deceased had died in the meantime, not having selected or

claimed her three hundred dollars out of the personal estate under the statute. After the will was set aside, the appellant became administrator of Bratney, Sr., and the appellee had become administrator of the widow. In making final settlement as executor, the appellee was allowed to credit himself with three hundred dollars, received as administrator of the widow, and with reasonable attorney's fees paid by him in resisting the contest of the will. There was no room to question his good faith in resisting the contest. The correctness of these allowances is questioned in this court.

It is contended by the appellant that the allowance of three hundred dollars which the statute makes to the widow is purely personal, and unless claimed during her lifetime, the right is gone and does not pass to her personal representatives.

We cannot bring ourselves to adopt this construction of the statute, 1 G. & H. 295, sec. 21. It seems to us that the right thus given is as full as the right of any distributee to the assets remaining for distribution after an estate has been settled; and we cannot, upon any sound rule of construction, limit it to the person of the widow. The right gives her a credit for the necessaries of life at once upon the husband's death, and the means of decent burial should she die before the amount comes to her hands. The statute requires a liberal, instead of a narrow, interpretation, in order to accomplish the purposes of the legislature in enacting it.

The other question, whether the decedent's estate was properly charged with the reasonable expenses of the executor in an unsuccessful effort made in good faith to resist the contest of the will, is not quite so clear. There would be forcible reasons for denying the right so to charge the estate in a case where the executor had incurred the expenses knowing that the contest was plainly meritorious. In such a case, his resistance must be hopeless and wrongful; and it may well be said that he should not be permitted

to expend the assets in a vain and unconscionable controversy to defeat those who were asserting a rightful claim against the invalid will, which stood between them and their just rights in those very assets; that it would be permitting him to apply their property to the purpose of attempting to deprive them of it. In such a case, natural justice would require the executor to pay the expenses of his wanton litigation *de bonis propriis;* and if this could be adjudged otherwise, it would only be on account of a rule of law positively requiring it.

But such is not the case before us. The good faith of the executor in endeavoring to maintain the will is not questioned. If it had been really a valid testament, he would have been grossly negligent concerning the trust which he had assumed, to have allowed the contestants to succeed without resistance. He was a trustee for legatees and devisees, and he must protect their just rights in the property, diligently and carefully. But he was not required to possess or exercise infallible judgment. That the courts at last adjudged the will invalid, does not prove that he litigated recklessly, or even incautiously. Prudent men often fail in lawsuits prosecuted or defended with great confidence of success. Men would not be found, fit and willing to undertake the duties incident to fiduciary character, if their personal liability for the expenses of suits growing out of the relation were to be fixed by adverse judgments in such suits. Such an one must act with fidelity, which implies reasonable care and prudence. If he do so, he should not be personally charged with the costs and expenses incurred. And so are the authorities. *Harrison* v. *Warner*, 1 Blackf. 385; *Downing* v. *Marshall*, 37 N. Y. 380, and cases cited.

Affirmed, with costs.

W. M. Franklin, *J. H. Louden*, *J. E. McDonald*, *A. L. Roache*, and *E. M. McDonald*, for appellant.

S. H. Buskirk and *J. S. S. Hunter*, for appellee.

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134 213

33 402
155 484

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162 397

The State *v.* Pottmeyer.

Riparian Owner.—*Ice.*—When the water of a flowing stream running in its natural channel is congealed, the ice attached to the soil constitutes a part of the land and belongs to the owner of the bed of the stream, who has the right to prevent its removal.

Same.—*Criminal Law.*—*Trespass.*—Where ice, valuable as an article of commerce, was removed without license, by cutting, from a pool formed by a dam in a stream not navigable, by a person owning the land opposite the place where the ice was cut, but the portion of the pool from which the ice was removed being over the land of another;

Held, that this was a trespass under section 14, 2 G. & H. 462, providing that any person who, without a license from competent authority, shall remove from the lands of another any tree, stone, timber, or other valuable article, shall be guilty of a trespass.

APPEAL from the Cass Circuit Court.

Ray, C. J.—This case was heretofore before this court, and the indictment, charging, that the appellee did then and there unlawfully cut, saw, and remove from land belonging to one Daniel P. Baldwin, in the county of Cass, one hundred cubic feet of ice, of the value of ten dollars, being then and there the property of said Baldwin, without a license, &c., was held good. 30 Ind. 287. Upon the trial of the case, the proof was, that the appellee removed the ice, which was of a specified value as an article of commerce, by cutting from a pool formed by a dam in a stream not navigable, and from the portion of the pool over the land of said Baldwin, the appellee owning the land opposite to the place where the ice was removed.

The court instructed the jury as follows:

"2. If the ice in controversy was formed in the waters of a flowing stream running in its natural channel over, on, and across a part of the land of Baldwin, it is no part of the land, and is not fairly included in 'other valuable article' as used in section 14, page 462, 2 G. & H."

"7. The fact that the ice was cut in the backwater of a mill-dam, where the current of the stream is checked, com-

monly known as a mill-pond, will make no difference, if it was a flowing stream as above described."

The instructions were excepted to, and there was a finding for the appellee.

The statute under which the indictment was found declares, that any person, who without a license so to do from competent authority, shall remove from the lands of another, any tree, stone, timber, or other valuable article, shall be deemed guilty of a trespass.

Upon the former consideration of this case, where the present question was somewhat discussed by counsel, but not decided by this court, the entire absence of direct authority to aid in its decision was observed. Since then, neither the research of counsel nor the attention of the court has been rewarded; and we must therefore look alone to analogies and the application of elementary principles. That there can be property in ice, formed upon an artificial pond, on one's own estate, was there decided, and that it constituted under such circumstances part of the realty, resulted as a necessary conclusion, or an indictment under this section of the statute could not have been sustained. *Bates* v. *The State*, 31 Ind. 72.

Indeed, that water is included in the term land, is taught by the text writers. "'Land,' *Terra*, in the legall signification, comprehendeth any ground, soile, or earth, whatsoever; as meadows, pastures, woods, moores, waters, marishes, furses, and heath," "and lastly, the earth hath in law a great extent upwards, not only of water, as hath been said, but of ayre and all other things even up to heaven; for *cujus est solum ejus est usque ad cœlum*, as is holden, 14 H. 8. fo. 12. 22 Hen. 6. 59. 10 E. 4. 14. *Registrum origin*, and in other bookes." Co. Litt. 4 *a*. Blackstone says, "the word 'land' includes not only the face of the earth, but every thing under it or over it." 2 Bl. Com. 18; Bouv. Law Dic.; 1 Greenl. Cruise, 46. So it was held in *Greyes Case*, Owen, 20, that fish in a pond passed, not to the executor, but to the heir; the court giving judgment, that he who had the water should

have the fish. And they are held as part of the realty. 2 Bouv. Law Dic., title "Pond."

Washburn says, "It may be added, in general terms, that every easement or servitude in lands, being an interest therein, can be acquired only by grant, or what is deemed to be evidence of an original grant. And in this are embraced rights in one man to take away the soil, or profits of the soil of another, called *profit a prendre*, if such right be of a freehold or inheritable character. In the matter of water, the owner of the bed of a stream may grant a certain quantity of water to be taken out of it, or a certain amount of water power measured and ascertained." But a man may grant trees growing on his land, corn on the ground, or fruit upon trees, without deed. So of the timber, stone, or other materials of a house, then standing upon his estate; and the donee in such case may take it away after the donor's death. "The law regards these things as so much of the character of chattels, as not to require the formality of a deed, to pass property in them." Washb. Real Prop. b. 3, ch. 4, § 3; *Brace* v. *Yale*, 10 Allen, 441.

Hilliard states, that "a watercourse is regarded in law as a part of the land over which it flows. Upon this principle it will pass with the latter by a deed or patent, unless expressly reserved. So the right to a watercourse is a freehold interest, of which the owner cannot be deprived, but by the lawful judgment of his peers, or due process of law." 2 Hilliard Real Prop. 203.

But while it must be admitted that water in a pool upon a man's own estate is his property and part of his real estate, it is denied that he has any property in the water of a stream which passes over his soil, but a simple *usufruct* while it passes along. 3 Kent Com. 439, 445. This use it is admitted, however, authorizes the actual taking of a reasonable quantity of the water for domestic, agricultural, and manufacturing purposes. *Id.*

In *Elliott* v. *Fitchburg R. R. Co.*, 10 Cush. 191, SHAW, C. J., says, "The right to flowing water is now well settled to

be a right incident to property in the land; it is a right *publici juris*, of such character, that whilst it is common and equal to all through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it, as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down. What is such a just and reasonable use, may often be a difficult question, depending on various circumstances. * * * It is therefore, to a considerable extent a question of degree; still the rule is the same, that each proprietor has a right to a reasonable use of it, for his own benefit, for domestic use, and for manufacturing and agricultural purposes." *Gould* v. *Boston Duck Co.*, 13 Gray, 442; *Brown* v. *Bowen*, 30 N. Y. 519; *Merritt* v. *Brinkerhoff*, 17 Johns. 306; *Patten* v. *Marden*, 14 Wis. 473; *Tyler* v. *Wilkinson*, 4 Mason, 397; *Evans* v. *Merriweather*, 3 Scam. 492.

"The general rule, as a rule of the common law of England, was long since laid down as unquestioned by Lord Holt, who says, in the case of *Rex* v. *Wharton*, Holt 499, that a river, of common right, belongs to the proprietors of the land between which it runs, to each that part nearest his land. This has been frequently, if not uniformly, adopted as the established rule. Bac. Ab. tit. Perogative; Sir John Daveis' R. 155." *Trustees of Hopkins Academy* v. *Dickinson*, 9 Cush. 544. The uses of the waters of private streams belong to the owners of the lands over which they flow. *Cooper* v. *Williams*, 4 Ohio, 253. "They are as much individual property as the stones scattered over the soil." *Buckingham* v. *Smith*, 10 Ohio, 288. This "property" however, in the water, should be limited to a reasonable use or consumption, as against the rights of other riparian proprietors.

But the entire ground upon which any property in water

as water, flowing in a stream, is denied, in distinction from the admitted property in its *impetus*, is in that, as Blackstone states, "it is a movable, wandering thing, and must of necessity continue common by the law of nature." 2 Bl. Com. 18. In *Sury* v. *Pigot*, Popham, 166, it is quaintly said, that an *ejectione firma* will not lie for water "because it is not *firma*, *sed currit*." But when this "movable, wandering thing" has congealed and become attached to the soil, does it not, like any other accession thereto, become part of the realty? Wherein does it differ from alluvion, or accretion? which is but the imperceptible deposit or addition of earth, sand, gravel, and other matter made by rivers, floods or other causes, upon land. Angell Watercourses, § 53. It is the adhering of property to something else, by which the owner of one thing becomes possessed of a right to another. Webster's Dictionary, where is cited the sentence from Richard Cobden, "The golden alluviens are there (in California and Australia) spread over a far wider space; they are found not only on the banks of rivers and in their beds, but are scattered over the surface of vast plains." This addition is alluvion, whether arising from natural or artifical causes. 2 Hilliard Real Prop., 195, note *a*; Bouv. Law Dic. It has been held, "the sea-weed thus thrown up by the sea, may be considered as one of those marine increases arising by slow degrees; and according to the rule of the common law, it belongs to the owner of the soil." *Emans* v. *Turnbull*, 2 Johns. 313.

In *Blewett* v. *Tregonning*, 3 A. & E. 554 (30 E. C. L. 151), which was an action for trespass for taking away sand from the plaintiff's close, it was pleaded that the close was contiguous to the seashore; that the sand had from time to time drifted and been carried by the wind from the seashore upon the close and been there deposited. PATTESON, J., said, "I am, however, of opinion that when anything in the nature of soil is blown or lodged upon a man's close, it is part of the close, and he has a right to it against all the world."

If water in a pool upon one's land be part of the realty, because fixed and stationary, why is it not, when congealed over the bed of the stream, to the thread of which his title extends?

True, nature will in time, if it be not removed, again change the ice to fluid, and it will pass away from possession; but not more certainly than the changing winds and the rising tide will sweep away the shifting sands.

But the Supreme Court of Massachusetts has discussed this subject, in a case where it was held, that the owner of a mill-pond on a water course cannot maintain a bill in equity to restrain a riparian proprietor above, from cutting ice on the same stream, until the rights of the parties have been determined at law. SHAW, C. J., says, "In a case between the owners of a mill with the privilege of a mill stream, and the riparian owner of land, on a large pond, supplying such mill stream, the nearest analogy perhaps, and that is apparently a strong one, is to that of riparian proprietors, on a running stream," which is the exact case now in judgment. He proceeds, "As between these, we think it is now well settled that the upper proprietor has a right to make any use of the stream which is beneficial to his estate and himself, which is reasonable, and does not either wholly take away the right of the lower proprietor, or does not practically and in a perceptible and substantial degree diminish and impair the equal and common right of the lower proprietor." The court then questioned the right of the mill owners to claim any participation in this right to cut ice enjoyed by the riparian proprietors. "But," the Chief Justice continues, "there are other considerations. It is quite doubtful, considering the complainants' claim as a claim for actual and substantial damage to their mills, whether the cutting and carrying away of the ice mentioned, or of any quantity of ice, would diminish the volume of water which would come to the complainants' mills, and of which they could avail themselves for driving their mills. Ice must be cut in winter. It usually melts in the

latter part of winter or early part of spring, together with the ice and snows of the surrounding country; and these, together with the rains which cause and promote them, constitute what is usually called the spring floods, which commonly cause a great surplus of water in similar mill streams, not only not available to any useful purpose to mills, but often injurious. And it may well be doubted after any quantity of ice cut from such a pond, whether after the spring floods have subsided, and the useless surplus of water passed away, and long before the approach of any 'dry season,' the water in the pond would not be as full and copious for all mill purposes as if no ice had been cut." *Cummings* v. *Barrett*, 10 Cush. 186.

Here the right of the riparian proprietor to cut the ice formed over his land is conceded, provided it does not deprive some one entitled to the use of the water, to a substantial degree, of his rights to such use. In the case before use, no such limitation is involved. If Baldwin has not the right himself to cut the ice (which right it seems to us he possesses), still he has a right to prevent its severance from his land. And this right in him of removal can only be controlled by proof that such act would work a substantial injury to some right possessed by the riparian proprietor opposite, or to some proprietor below on the stream. And in neither case could it deprive him of his property in the ice, but simply control him in its disposition. Indeed, this right in the owner of the fee to remove ice from the stream, subject to a proper enjoyment of the water by others entitled to its use, was decided to exist in *Edgerton* v. *Huff*, 26 Ind. 35.

In *Mill River Manufacturing Co.* v. *Smith*, 34 Conn. 462, where the company owned an artificial mill pond, it was held, that it also owned the ice formed upon the pond, and that it was entitled to have the ice remain where it was; and an action of trespass *quare clausum fregit* was maintained against the riparian proprietors, who owned the bed of the original stream, but did not in that case own the artificial

mill pond, for removing the ice. Clearly, such an action could be maintained by Baldwin, who owned not only the bed of the stream, but the ice itself; and it follows, of course, that the instructions given by the court were erroneous.

Judgment for costs against appellee.

D. P. Baldwin, *D. H. Chase*, and *D. E. Williamson*, Attorney General, for the State.

The State v. Clottu.

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157 390

Parent and Child.—*Legislative Control.*—How far the interference of the legislature in its control of the relation of parent and child should extend, is a question, not of constitutional power for the courts, but of expediency and propriety, which it is the sole province of the legislature to determine.

Same.—*Liquor Law.*—*Minor.*—It is not a good defense to an indictment for selling intoxicating liquor to a person under the age of twenty-one years, that the father of the infant authorized the defendant to make the sale to the minor.

APPEAL from the Cass Circuit Court.

Frazer, J.—This was an indictment against the appellee for selling intoxicating liquor (less than a quart) to a person under twenty-one years of age. It was determined by the court below as a matter of law upon the trial, that if the father of the infant authorized the appellee to make the sale to his son, such fact would be a good defense, and there was accordingly an acquittal upon that ground. The State reserved the question of law for the opinion of this court, and now presents it.

The statute (1 G. & H. 614), in language too distinct to leave any question as to its meaning, prohibits the sale of such liquors in quantity less than a quart at a time, except by persons who may have obtained license to do so; and then in language equally clear provides that such license shall not authorize a sale "to any person under the age of

twenty-one years," nor to one who is intoxicated, nor on Sunday, nor on the day of an election. It seems very clear to us that the legislature intended to protect the young from the temptations which tippling-houses were supposed to present, tending to lead them into habits generally conceded to be dangerous to health and character and to their usefulness and good order as citizens of the State. The question, then, seems to involve an inquiry concerning the constitutional authority of the legislature to do this thing.

We know of nothing in the State constitution prohibiting the legislature from passing such an act. We are without any argument in support of the ruling below, and cannot examine the particular grounds upon which the learned judge upon the circuit based his judgment, or upon which it may be supposed that it can be maintained, for the reason that we are not advised of them.

Sometimes courts have gone beyond the letter and fair implications from the letter of the written constitution of government, to find, in what is called the spirit of the instrument, inhibitions upon the exercise of legislative power; and where the act in question is obviously unwise, or to the judicial mind appears likely to result in consequences very mischievous or dangerous, the temptation to do so is certainly strong. But this search, outside of a constitution, for constitutional objections to an act of the legislature, though it has been, on rare occasions, indulged by courts of high character, is itself of doubtful propriety. It is the written constitution which is the supreme law to which legislation must conform, and not the views of even the wisest and purest judges of what should have been written in it, but was not; nor the theories of government which may be supposed to underlie it, without any expression to warrant the assumption. It may be possible to conceive of legislation so plainly beyond the scope of governmental power, or so flagrantly in conflict with natural right, that the courts may set it aside as unwarranted, though no clause of the constitution can be found prohibiting it. But the cases

must be rare indeed; and whenever they do occur, the interposition of the judicial *veto* will rest upon such foundations of necessity that there can be little or no room for hesitation. If the matter be reasonably the subject of debate, it is an admonition that the court should stay its hand. The constitution limits the power of the judiciary as plainly as it does that of the legislature, and any disregard of this limitation is a plain subversion of the constitution, quite as mischievous in its tendencies and less easy of cure than legislative infractions of the same instrument. This limit upon the authority of the judiciary is plainly marked, and forbids the exercise of legislative power by the courts. If laws are merely unwise and mischievous, however clear this may be, the courts have no constitutional power to repeal them; that power is vested in the legislature exclusively. The legislature of this State, within its legitimate sphere, does not lie fettered at the feet of this court, but is a department of government co-ordinate and equal, and upon matters of legislation within its power it is superior, instead of inferior. This is so plain that it is scarcely necessary to express it. The remedy for merely unwise laws, then, is not by application to the courts, destitute of power to grant relief; but it is found in the ballot, in the election of a legislature to repeal or amend. Whether an act is expedient or not, whether wise or not, whether right or not, are questions proper for discussion there, and wholly inadmissible in the courts, whose duty is, not to make or disregard law, but to administer it as it is written.

The duties and authority pertaining to the relation of parent and child have their foundations in nature, it is true. Nevertheless, all civilized governments have regarded this relation as falling within the legitimate scope of legislative control. Except in countries which lie in barbarism, the authority of the parent over the child is nowhere left absolutely without municipal definition and regulation. The period of minority is fixed by positive law, when parental control shall cease. Within this, the age when the child

may marry at its own will is in like manner defined. The matter of education is deemed a legitimate function of the state, and with us is imposed upon the legislature as a duty by imperative provisions of the constitution. The right of custody, even, is sometimes made to depend upon considerations of moral fitness in the parent to be entrusted with the formation of the character of his own offspring. In some countries, and even in some of our American states, education has for more than a century been made compulsory upon the parent, by the infliction of direct penalties for its neglect. The right of the parent to ruin his child either morally or physically has no existence in nature. The subject has always been regarded as within the purview of legislative authority. How far this interference should extend is a question, not of constitutional power for the courts, but of expediency and propriety, which it is the sole province of the legislature to determine. The judiciary has no authority to interfere with this exercise of legislative judgment; and to do so would be to invade the province which by the constitution is assigned exclusively to the law making power.

We think the court below erred upon the question of law reserved.

Judgment for costs against the appellee.

D. E. Williamson, Attorney General, for the State.

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130	207
33	412
148	187

Clackner *v.* The State.

Witness.—*Impeachment.—Rebutting Evidence for Defendant in Criminal Action.*—After the defendant in a criminal action had closed his evidence, the State called a witness who testified that the general character of a certain witness who had given material testimony for the defendant, by whom he had been introduced, was bad.

Held, that after the State had closed her rebutting testimony, the defendant

was entitled to introduce another competent witness to testify that he was acquainted with the general character of said former witness, which had been so attacked, and that it was good.

LARCENY.—*Evidence.—Possession of Stolen Goods.*—The defendant in a prosecution for larceny may rebut the presumption of guilt arising from the fact that the goods were found in his possession soon after they were stolen without giving any account of the manner in which he obtained possession of them.

APPEAL from the Wayne Criminal Court.

GREGORY, J.—The appellant was indicted in the court below for stealing hams, lard, and lard-cans. Trial by jury; verdict, guilty; motion for a new trial overruled; and judgment.

There are two grounds on which it is insisted that the court erred in overruling the motion for a new trial, the exclusion of evidence, and misdirection of the jury in charges given by the court.

The defendant had introduced as a witness one Henry Long, who gave material testimony for him. After the defendant had closed his testimony, the State called one Kimmel who testified that the general character of Long was bad. The defendant, after the State had closed her rebutting testimony, offered and proposed to prove by one Eliza Clackner, a competent witness, that she was acquainted with the general character of Long, and that it was good. The court refused to allow the evidence thus offered.

Mr. Starkie states the rule accurately. He says, that "a party cannot bring evidence to confirm the character of a witness before the credit of that witness has been impeached, either upon cross examination, or by the testimony of other witnesses; but if the character of a witness has been impeached, although upon cross examination only, evidence upon the other side may be given to support the character of the witness by general evidence of good conduct; and where the character of a witness is impeached by general evidence, the party who calls him is at liberty to examine the witnesses as to the grounds of their belief; and in all cases where the credit of a witness has been at-

tacked, whether by general evidence or by particular questions put upon cross examination, it seems that the party who called him is at liberty to support his testimony by general evidence of good character." Starkie Ev. 222, 8th Am. ed.

In *Commonwealth* v. *Ingraham*, 7 Gray, 46, it was held, that an attempt to impeach a witness, by asking another witness what was his character for truth, warrants the introduction of evidence to support his character, although the answer to the question was that his character was good.

The code provides, that "in all questions affecting the credibility of a witness his general moral character may be given in evidence." 2 G. & H. 171, sec. 242. The impeachment of the witness's general character gave the defendant the right to sustain that character. This is one of the cases where rebutting evidence is allowed to rebutting evidence; otherwise a defendant would be deprived of the right to sustain the credit of his witnesses, when they were attacked in the rebutting evidence of the plaintiff.

This is warranted by the criminal code. The order of criminal trials is thus stated: "First, the prosecuting attorney must state the case, and offer the evidence in support of the prosecution; second, the defendant or his counsel may then state his defense, and offer evidence in support thereof; third, the parties may then respectively offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case." 2 G. & H. 414, sec. 103.

It was not competent for the defendant to sustain his witness until attacked by evidence. He could only offer such evidence by way of rebutting the impeaching testimony. The court erred in excluding the evidence offered.

Over the objection and exception of the defendant, the court charged the jury, "4. If goods are stolen, and are shortly afterwards found in the possession of the defendant, *common honesty and the law requires him to give a reasonable account of how he came by them;* this may be strengthened or

weakened by the length of time and kind of property; and all the circumstances should be taken into consideration by the jury."

"11. If the goods were stolen, and were shortly afterwards found, or some of them, in the possession of the defendant, *the law requires of him that he should give some account of the manner he obtained the goods*, and raises a presumption of guilt; and the account or the want of it and its reason always is given with the length of time and kind of goods and all the circumstances, and give them all such weight as the jury, being prudent men, think they should have."

The court, on motion of the defendant, charged the jury, that "the fact that stolen property is found upon a person may always be given in evidence in a prosecution for the larceny against him, and must always be consistent with his guilt; but the strength of the presumption which it raises against the accused, or whether any at all, depends upon the explanations or the want of them by the defendant, indeed, upon all the circumstances surrounding the transaction."

It is claimed that that portion of the instructions in italics is erroneous. It is argued, that a defendant may rebut the presumption of guilt arising from the possession of stolen property without in any way accounting for the possession.

Mr. Phillipps lays down the general rule thus: "On indictments for larceny, proof that part of the stolen goods have been found upon the person of the prisoner, or in his house or possession, is presumptive evidence against him of his having stolen them, so as to call upon him for his defense, and may be sufficient to warrant a conviction if no facts appear in evidence to repel that presumption." 1 Phillipps Ev. 634.

Certainly, facts much short of giving a reasonable account of how the accused came by them, will rebut the presumption arising from the possession of stolen goods.

Cowen and Hill, in their notes to Phillipps on Ev., have

examined this subject with care and learning. In note 183, p. 634, it is said, "The presumption arising from the possession or other circumstances, may, of course, be explained away or repelled by opposing circumstances. The better opinion seems to be, that the presumption arising from possession alone is completely removed by *the good character alone* of the prisoner. * * * The possession of the goods may also be accompanied with circumstances (such as unsuspicious conduct) repelling the presumption."

The error committed in the fourth and eleventh instructions given by the court is not corrected by the instruction given on the motion of the defendant. The jury would understand that "the explanations" must embrace what the court had told them common honesty and the law required.

The court erred in overruling the motion for a new trial.

Judgment reversed; cause remanded, with directions to grant a new trial, and for further proceedings. Prisoner remanded.

G. A. Johnson and *T. J. Study*, for appellant.

B. W. Hanna, Attorney General, for the State.

Marianne Schipps

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125 134

Crocket *v.* The State.

Sunday.—*Criminal Law.*—*Work of Necessity.*—Such labor on Sunday as is a necessary incident to the accomplishment of a lawful purpose, such as the manufacture of malt beer, is not a violation of the statute for the protection of the Sabbath, 2 G. & H. 481.

APPEAL from the Wayne Criminal Circuit Court.

Ray, C. J.—Indictment for violation of the act of February 28th, 1855, 2 G. & H. 481, for the protection of the Sabbath. Trial by the court; conviction; and, over a mo-

tion for a new trial, a fine imposed. The proof on the trial was that the appellant had three or four times, on different Sundays, worked at a certain malt house in turning a heap of barley, for the purpose of malting the same, it requiring an hour or two to do the work each time.

On the part of the defendant, it was proved that the process of malting the barley was as follows: Into a tub, calculated to hold three hundred bushels when half filled with water, the barley was run. Then the water is changed twice a day for three days. Unless this is done the barley will spoil. The barley is afterwards removed from the tub and placed in the cellar, where it remains four days and nights, during which time it malts, or sprouts; and it requires to be turned upside down at least three times each day in summer, and twice each day in winter. Unless this labor is performed the sprout will be destroyed; the grain will heat at the base and mould on the outside. After four days the barley is drawn on a kiln, to dry; and while there, it must be turned four times each day for two days, the third day three times, when it is out of much danger. The time required to malt is ten days, and any neglect during that period for twenty-four hours to handle the barley would spoil it.

Our statute excepts works of "necessity;" and as the evidence introduced proves the labor, with which the appellant is charged, to have been a work necessary to accomplish the object in view, and as the law authorizes the manufacture of beer, the purpose therefor being lawful, the labor was also lawful.

In Massachusetts, in *Commonwealth* v. *Knox*, 6 Mass. 76; as early as the beginning of the present century, Chief Justice PARSONS recognized the principle that any labor necessary, by which, he says, "cannot be understood *physical* necessity," but such labor as is necessary to accomplish a lawful object, under the circumstances of any particular case, cannot be considered as against the prohibition of the statute. So in

McGatrich v. *Wason*, 4 Ohio St. 566, it was held, that "the necessity may grow out of, or, indeed, be incident to, a particular trade or calling." Clearly, in the case in judgment it is such an incident. Indeed, the case of *Morris* v. *The State*, 31 Ind. 189, is conclusive against the ruling of the court below. We will simply add a few authorities to the citations made in that case. *Flagg* v. *The Inhabitants of Millbury*, 4 Cush. 243; *Whitcomb* v. *Gilman*, 35 Ver. 297; *Logan* v. *Mathews*, 6 Penn. St. 417; *Myers* v. *The State*, 1 Conn. 502.

Judgment reversed, and cause remanded for new trial.

L. Develin, *W. A. Peelle*, and *H. C. Fox*, for appellant.

D. E. Williamson, Attorney General, for the State.

WANNIE SCRIPPS

CLEM *v.* THE STATE.

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169	312

LOCAL LAWS.—*Creation of Inferior Courts.*—For the creation of courts inferior to the circuit court, the legislature has power to pass laws local to one or more counties whose circumstances may so require, where such laws, if of uniform operation throughout the whole State, would be elsewhere mischievous, useless, or burdensome.

CRIMINAL CIRCUIT COURT.—The criminal circuit courts of this State are not the circuit courts contemplated by sections 1, 8, and 13, of article 7 of the constitution, but are inferior courts in the same sense that the courts of common pleas are inferior.

SAME.—*Construction of Statute.*—The valid existence of the criminal circuit court is not affected by the attempt in the statute to deprive the circuit court of jurisdiction in criminal matters, or by the seeming attempt to create a circuit within the boundary of another circuit.

SAME.—*Marion Criminal Circuit Court.—Judge.—Tenure of Office.*—The provision of section 2, article 15, of the constitution that "the General Assembly shall not create any office, the tenure of which shall be longer than four years, has no application to a case where an office is created of which no tenure is fixed, as in the act creating the office of judge of the Criminal Circuit Court of Marion county.

SAME.—*Declared Constitutional.*—The criminal circuit court of Marion county possessed a constitutional existence prior to the act of May 13th, 1869, defining the term of office of the judge thereof and legalizing the previous

proceedings of the court, and had jurisdiction to try an indictment for murder.

SAME.—*Grand Jury.*—Where a grand jury was discharged by a criminal circuit court until a certain day, and appeared, not on that day, but upon the next day after;

Held, that said grand jury was not dissolved by its failure to appear at the day appointed.

SAME.—*Sessions of Grand Jury.—Pleading.—Abatement.*—A plea in abatement in the criminal circuit court alleged, that *it appeared by the records* of said court as follows: that the indictment against the defendant was returned by the grand jury on the 20th of a certain month; that said grand jury was in session on the 29th of the next preceding month and thereafter continually till the date of the return of the indictment; and that there was no entry of record showing an adjournment or discharge of the grand jury between the days aforesaid.

Held, that the plea was bad, because it merely alleged evidence, and not the fact relied on—that the grand jury had been in session in the month in which the indictment was returned more than ten days before returning the indictment.

CRIMINAL LAW.—*Change of Venue.—Counter Affidavits.*—Upon an application in a criminal action for a change of venue to another county on the ground of local prejudice, it is not error to receive counter affidavits.

SAME.—*Juror.—Competency.—Previously Formed Opinion.*—Two of the jurors who tried an indictment had previously formed what they called "a partial opinion" of the case, from reading newspaper accounts of the facts and from rumor, and one of them had expressed that opinion, which it appeared was a mere impression, not made up from conversation with witnesses; and they thought that if sworn as jurors said opinion would have no influence upon them, and that they could act solely upon the evidence offered upon the trial; and it was evident that they had no fixed opinion upon which they rested.

Held, that they were not for this cause incompetent as jurors.

SAME.—Upon a motion for a new trial of an indictment, affidavits were read to the effect that a certain juror had, before he was sworn as such, said that from all appearances he believed the defendant guilty; but one of the affidavits stated that the conversation was in a jocular manner, and did not at the time impress the affiant as being spoken sincerely; and the juror admitted by affidavit that he might have said that if what he had heard was true, he believed the defendant guilty, but nothing more.

Held, that the affidavits did not show that the juror was incompetent.

SAME.—Where, upon a motion for a new trial in a criminal case, an affidavit is read to the effect that a certain juror, before being sworn as such, declared his belief of the defendant's guilt, and said juror denies this under oath, the Supreme Court cannot interfere with the lower court's decision in favor of the juror of the question of veracity here involved; and where, in addition to this, other persons make oath that the general character for truth

and veracity and the general moral character of the person making such affidavit are bad, a new trial should not be granted for the cause stated in such affidavit.

WITNESS.—*Impeachment.*—Where a witness has been impeached by proof of statements made by him contradictory of the facts to which he has testified, the party who produced such witness may introduce evidence of his general good character.

MURDER.—*Instruction to Jury.*—*Consent.*—On the trial of an indictment for murder in the first degree, the court charged the jury, that if the defendant "was present at the time and place of the murder, in any way assisting, aiding, encouraging, or contributing towards the murder, she would be guilty as a principal in the crime. *So if the murder was perpetrated with her knowledge and consent or connivance, she is a principal.*" The jury found the defendant guilty of murder in the second degree.

Held, that the giving of the last sentence of this instruction was error, for which the defendant was entitled to a new trial.

APPEAL from the Marion Criminal Circuit Court.

The appellant, Nancy E. Clem, was indicted jointly with Silas Hartman and William J. Abrams, for murder in the first degree; the indictment charging that, on the 12th of September, 1868, said defendants did with force and arms, unlawfully, feloniously, purposely, and with premeditated malice, kill and murder one Nancy Jane Young, by the use of guns and pistols loaded with balls, shot, &c.

The defendants filed joint pleas in abatement, demurrers to which were sustained, and the defendants excepted. The defendants pleaded not guilty. The appellant moved the court for a change of venue from the county of Marion, and filed affidavits in support of her motion; and, over the appellant's objection, the court permitted the State to file counter affidavits, to which the appellant excepted. The motion was overruled, and the appellant excepted.

The jury found the appellant guilty of murder in the second degree, and sentenced her to be imprisoned in the state prison during life.

The appellant moved for a new trial, and then in arrest of judgment. The motions were overruled, and the appellant excepted. Judgment was pronounced in accordance with the verdict. The additional facts are sufficiently stated in the opinions.

FRAZER, J.—This was an indictment for murder, tried in the Marion Criminal Circuit Court. The first question which presents itself for consideration is, whether that court possessed a constitutional existence when this cause was tried and the judgment rendered, it being prior to the act of May 13th, 1869, defining the tenure of office of the judge thereof and legalizing previous proceedings of the court. See Acts 1869, Spec. Sess., p. 52.

If it is within the scope of legislative power to legalize and make valid the proceedings and judgments of a court which it was not within the authority of the legislature to create in the first instance, the act alluded to would obviate the question in hand; for it is ample in its terms to cure everything. We are not prepared, however, to say that a constitutional prohibition could be thus evaded, and cannot therefore dispose of the inquiry in that way.

We have heretofore had occasion to consider whether the legislation by which the criminal circuit court was created was in conformity with the constitution, and we resolved it in the affirmative. *Combs* v. *The State*, 26 Ind. 98; *Anderson* v. *The State*, 28 Ind. 22. But we were not, in those cases, aided by that fullness of argument with which the question is now presented; and, indeed, its chief difficulties were not then suggested by counsel and did not occur to us, and, of course, were not considered. We never meant to hold that in the creation of the circuits provided for in art. 7, sec. 9, of the State constitution, one circuit could be formed within the territory allotted to another, or that the criminal circuit court is the circuit court contemplated by secs. 1, 8, and 13 of that article.

The power to create courts inferior to the circuit court is expressly given. Art. 7, sec. 1. And the authority to pass laws for that purpose, local to one or more counties, whose circumstances require them, when such laws, if of uniform operation throughout the whole State, would be elsewhere mischievous, useless, or burdensome, is equally clear. Art. 4, sec. 23. It is ordinarily a question of fact

whether a law of uniform operation can be properly applied to accomplish a given end, which is desirable for some localities; and in *Gentile* v. *The State*, 29 Ind. 409, we held, upon very mature consideration, that in such a case, the decision of the legislature upon that question of fact is not subject to review by the courts. But in any event, when the judicial business of one county requires these courts to be in session almost constantly, that justice may be administered without delay, as the constitution enjoins, while in each of fifty other counties a single court can transact the whole business by sitting a few weeks in each year, it is not a proposition open to debate, either in the legislature or here, that such laws as to the creation of courts as the necessities of the one county require cannot in any reasonable sense be made applicable to the fifty counties. Such senseless uniformity as that upon that subject is not required either by the letter or spirit of the constitution.

The inapt name, "Criminal *Circuit* Court," determines nothing as to the character of the tribunal. We learn that from the jurisdiction with which the law has invested it. That jurisdiction is confined to criminal causes, while the circuit courts generally possess an extended jurisdiction both civil and criminal. The criminal court is inferior comparatively, and it is therefore an inferior court in the same sense that the court of common pleas is such; and if the creation of the latter, with its present extensive jurisdiction, is warranted by the constitution, the criminal court has the sanction also of that instrument. It matters not that the act defining its jurisdiction attempts to deprive the Circuit Court of Marion county of all criminal jurisdiction, even assuming that it was not contemplated to circumscribe the jurisdiction of that court within a limit not applied to all the circuit courts. See Acts 1865, Spec. Sess., p. 150, sec. 5. This could not affect the existence of the criminal court in any sense; the worst possible result would be that the Marion Circuit Court still possesses, though not exclusively, its former criminal jurisdiction; and it is not necessary in

the present case, to express any further opinion concerning it. An entire act is not ordinarily vitiated by the unconstitutionality of a single section; so much as is in harmony with the fundamental law will stand. Nor does it seem to us of any consequence to the case before us, that in creating the court, the legislaure should have attempted the novel and unnecessary thing of creating a circuit within a circuit. See *id.* 153, sec. 1. This act, nevertheless, creates a criminal court for Marion county, and it can do no harm that, for such a purpose only, the county was called the sixteenth judicial circuit. Much of the doubt which the profession has entertained as to the valid existence of the court has had its origin in this feature of the act and in the name given to the court. These things tend to confusion, it is true, but the court must be judged by its powers; and when these are referred to, it is not possible to confound the criminal court with the circuit court contemplated by the constitution and created in pursuance of its provisions.

There remains, however, an argument against the existence of the criminal court which has seemed to us more formidable than any other. The legislature had not, until after the trial of this cause, fixed the duration of the term of office of the judge of the criminal court, though it provided for his election. In the absence of a provision of the constitution upon the subject, the tenure of the office would have been without limit as to time, unless at a subsequent time a limit had been fixed. But art. 15, sec. 2, declares that "the General Assembly shall not create any office, the tenure of which shall be longer than four years." The question is as to the application of this restriction. Does it in the case in hand render the creation of the office a void act? If so, then the court was without a judge, there was no warrant of law to elect or appoint one, and there could be no such officer *de facto*, much less *de jure;* and, of course, it would follow that all the proceedings of the court were utterly void. But we are of opinion that the restriction cannot be held to apply where, as in this case, no tenure is fixed. The pre-

ceding part of the section provides, that "when the duration of any office is not provided for by this constitution it may be declared by law; and, if not so declared, such office shall be held during the pleasure of the authority making the appointment." This language seems to be conclusive in support of the position that an office may be created by law though its duration be not fixed, as in this case. If fixed at a longer term than four years by the act creating it, there would then be a question whether the creation of the office was not void, or whether valid, but its tenure limited to four years by force of the constitution. But no such thing was attempted in the present instance. Here the office was created; its duration was not fixed; and by the express letter of the constitution it would continue, for the time being, during the pleasure of the authority making the appointment. The office was created by valid legislation, and no question is presented by this record concerning the right of the particular person exercising its functions.

Upon the whole, then, after the fullest deliberation, we reach the conclusion that the Marion Criminal Court was at the time of the trial a valid tribunal, lawfully existing—a court inferior to the circuit court contemplated by the constitution, with jurisdiction to try this cause.

The next question presented is as to the sufficiency of the first plea in abatement, by which it was averred that on a certain day of the term the grand jury was discharged until a certain future day; that it did not appear on that day, but upon the day after; and that without being re-impanelled it subsequently found and returned this indictment. It is contended that by its failure to appear at the time appointed, the grand jury was dissolved; and that the indictment was therefore not returned by a lawful grand jury, duly impanelled. No authority is cited in support of this position, nor are we aware of any. Nor does it seem to us to be sustained by any sound reason. We are not prepared to hold that by disregarding a proper order of court, a grand jury can dissolve itself. We are of opinion, there-

fore, that the court below did not err in sustaining a demurrer to this plea.

There was a demurrer also sustained to a second plea in abatement, and this is assigned for error. This plea alleges that it appears by the records of the court as follows: that the indictment was returned on the 20th of October, 1868; that the grand jury were in session on the 29th of September, and thereafter continuously until said 20th of October; and that there was no entry of record showing an adjournment or discharge of the grand jury between the days aforesaid. This plea was intended to rest upon the act of 1865 (Spec. Sess., 156), which provides that in the criminal court the grand jury shall not sit more than ten days in each month. We think the plea bad, because it does not aver facts, but merely that certain things appear by the records of the court. This merely states evidence of the fact relied on, without averring the fact itself, that the grand jury had been in session in the month of October for more than ten days before returning the indictment. It might well be that the existing record was as alleged, and yet that in truth the grand jury had not been sitting in October ten days before returning the bill. A record in evidence imports absolute verity, it is true, but sometimes orders are omitted by clerical mistake, which may be subsequently supplied. So that there is reason for the rule, even in such a case, that the plea should show, not what the evidence is, but what the fact is.

In *Anderson* v. *The State*, 28 Ind. 22, we held, that upon an application for a change of venue to another county upon the ground of local prejudice, it was not error to receive counter affidavits. This was followed in *Morgan* v. *The State*, 31 Ind. 193. The question is again presented, and we adhere to the ruling. We are of opinion, too, that in this case the motion for the change was correctly overruled.

Two jurors had formed what they called "a partial opinion" of the case, from reading newspaper accounts of the facts and from rumor, and one of them had expressed that

opinion. It further appeared that this partial opinion was a mere impression, not made up from conversations with witnesses, and they thought that if sworn as jurors it would have no influence upon them, that they could act solely upon the evidence offered upon the trial. It is evident, indeed, that they had no fixed opinion upon which they rested. A challenge for cause to each juror was refused, and the question is presented here. It is in no material respect different from the inquiry as presented in *Fahnestock* v. *The State*, 23 Ind. 231, and *Morgan* v. *The State*, 31 Ind. 193, where we held, as, indeed, had been previously decided in several other cases, that the juror was competent. It may be regarded as settled, that the opinion which, under our statute, renders a juror incompetent is not that vague and unsatisfactory impression which the mind receives at second hand, and which vanishes in the presence of authentic testimony, and upon which no man of common sense would take responsible action. If it were otherwise, in this age of newspaper enterprise, when the particulars of every startling event are so speedily and generally carried into almost every family, intelligent men would usually be incompetent jurors, and ignorance would be the essential qualification to try the gravest criminal causes.

Upon a motion for a new trial, affidavits were read to the effect that one of the jurors thus challenged, Moore, had before he was sworn as a juror said, "that from all appearances he believed Mrs. Clem guilty." One of these affidavits, however, stated that the conversation was in a jocular manner, and did not at the time impress the affiant as being spoken sincerely. Moore himself by affidavit admitted, as he had virtually done before being sworn as a juror, that he might have said if what he had heard was true, he believed her guilty, but nothing more. All this amounted to very little, and certainly afforded no sufficient reason for a new trial. The opinion expressed was hypothetical, and did not disqualify the juror.

A similar affidavit was read, made by one Alhand, to the

effect that Vance, another juror, had, before being sworn as a juror, declared his belief of the defendant's guilt. But Vance explictly denied this under oath, and three others made oath that Alhand's character for truth and veracity and his general moral character were bad. The subject, so far as relates to the juror Vance, certainly needs no discussion.

So as to the jurors Wilson and Stokely. There is an affidavit as to each, stating the prior expression of an opinion of guilt, which each of those jurors flatly denies by counter affidavit. We cannot say that the court below erred in determining the question of veracity thus presented.

Evidence of the general good character of a witness for the State was allowed, over the defendant's objection, after the defense had impeached the witness by proof of statements made by him contradictory of the facts to which he had testified. This action of the court below was in accordance with the decision of this court in *Clark* v. *Bond*, 29 Ind. 555, which we are asked to reconsider. The sole object in asking a witness whether he had made statements elsewhere not in accordance with his testimony, and upon his denial, calling other witnesses to show that he did make such statements, is to create the belief that he is not a credible witness. Impeachment of a witness by proof of his bad character is intended to accomplish exactly and only the same thing. The statements and the bad character are alike immaterial, except for the single purpose of affecting the credit of the witness, and it is not easy to say that the two methods are not about equally efficient in accomplishing the end. In either case, the credibility of the witness is impaired; nor is this incidental, as in the case of a contradiction between witnesses as to a material fact. If it is just in the one case that a party should be permitted to establish the credit of his witness by showing his good character, it is alike just in the other case. The sole question in each is, what credit should be given to the impeached witness? And any distinction between them as to the kind of evidence allowable, or which admits it in one case and excludes it in the other, is

technical, and, it seems to us, without any foundation in justice, and is not even supported by the argument of convenience. Though in Massachusetts, New York, Pennsylvania, and perhaps in Connecticut, it is held that to meet such an impeachment, evidence of good character is not admissible, the contrary rule is stated by both Phillipps and Greenleaf, and is held in Vermont and Alabama. *State* v. *Roe*, 12 Vt. 93; *Hadjo* v. *Gooden*, 13 Ala. 718. In *Rex* v. *Clarke*, 2 Stark. 241, the court went still further, admitting evidence of a particular fact to support a witness shown on cross examination to have been convicted of larceny. The evidence admitted was, that she had received a reward for subsequent good conduct; and it was put by the court upon the ground that her character had been impeached and might be thus supported. If so, it would seem less questionable that proof of good general character would have been admissible. In *Brown* v. *Mooers*, 6 Gray, 451, it was said that the statement in Greenleaf "is not law," though the case did not, as we think, call for any opinion upon the subject, as there had been only an attempt, which failed, to prove the contradictory statements. It seems however, that, in that court, it is held that an unsuccessful attempt to impeach by general evidence of bad character opens the door to the other side to put in general evidence of good character (*Comm.* v. *Ingraham*, 7 Gray, 46), a proposition which would hardly receive assent elsewhere. There are other peculiarities in the rulings in that state upon the general subject of impeachment, not at all accordant with what is understood to be the law in England and in most of the states of the Union. See *Tucker* v. *Welsh*, 17 Mass. 160. It seems to be made easy there to impeach by proof of contradictory statements, though it is rendered difficult to repel the attack; while impeachment by assault upon general character is rendered perilous to the party who even attempts it. It does not seem to us that the discrimination is well founded, nor that its tendency can be favorable to the attainment of just results in practice. We are well

satisfied to adhere to the ruling upon the subject as made in *Clark* v. *Bond, supra*, though we have felt it due, as well to the importance of the present case as to the high character of the courts which have held otherwise, to give the subject a more extended discussion than was done at that time.

Objection was made by the appellant to evidence of her prior extensive financial transactions with banks and individuals; but the evidence was admitted. There was no error in this. The tendency of this, in connection with evidence of her business transactions with Jacob Young, who it appeared had been murdered at the same time with his wife, Nancy J. Young, was to show that the defendant had a strong motive of gain as well as reputation to be subserved by the homicide and destruction of papers supposed to have been upon Young's person at the time.

A double-barrelled gun was found near the dead bodies, one barrel of which was yet charged, the other being empty. The victims had been shot. The State offered to prove the purchase of this gun by the co-defendant Abrams, on the morning of the day upon which the murder was committed, and was allowed to do so against the objection of the appellant that the acts of an alleged conspirator with her could not be shown against her, in advance of any evidence showing such conspiracy. The rule of law relied upon to sustain the objection seems not to be inflexible. Mr. Greenleaf says that it is in the discretion of the court under particular and urgent circumstances, for convenience, the prosecutor undertaking to furnish such proof afterwards. 1 Greenl. Ev., sec. 111; 3 *id.* sec. 92. But in this case, the evidence offered tended to prove the conspiracy itself, by connecting Abrams with the crime. It was a link in the chain of circumstances by which that fact was supported. It would ordinarily be impossible to show a conspiracy save by the acts of the various persons engaged in it. It would be rare, indeed, that the acts and declarations of one only would show the connection of the others. See 3 Greenl. Ev., sec. 94.

Parol evidence of what the defendant directed a witness

to enter in a book of accounts was admitted over her objection. The evidence related to her financial transactions, and was not irrelevant, as we have already seen. But it is urged that the parol evidence was an improper method of proving what the book contained. It seems sufficient to say that the evidence tended, not to prove the entry made, but merely what the defendant directed. It was not secondary, but original evidence.

We are urged to reverse the case upon the evidence. There was so much evidence of guilt that our interference with the verdict upon this ground is out of the question.

The correctness of several of the instructions given by the court to the jury is called in question. These instructions, thirty-three in number, were applicable to the case, and were, in the main, not only unobjectionable, but a very clear, correct, and careful statement of the law. Most of the objections made to them are not of such a nature as to justify the labor and space which would be required to discuss them in detail. Such as are not specified in this opinion have been carefully considered, however, and we are of opinion that they are not well taken.

The fifteenth instruction was as follows: "If all the circumstances of a criminative character which have been proved are subject to explanation upon any reasonable hypothesis consistent with the innocence of the prisoner, she is entitled to the benefit of such explanation. So, if it should be that you should have no reasonable doubt from the evidence that Silas Hartman, either by himself or in connection with others, not including the prisoner, perpetrated the murder, and should have a reasonable doubt whether the only connection the prisoner had with the transaction was to harbor, conceal, or assist Silas Hartman, her brother, after the perpetration of the deed, with the intent that he should escape detection or punishment, she would not be guilty of any crime under the law. But if she was present at the time and place of the murder, in any way assisting, aiding, encouraging, or contributing to-

wards the murder, she would be guilty as a principal in the crime. *So, if the murder was perpetrated with her knowledge and consent or connivance, she is a principal.*"

Question is made as to the correctness of the last clause of this instruction.

When the jury was told, that if the defendant "was present at the time and place of the murder, in any way assisting, aiding, encouraging, or contributing towards the murder, she would be guilty as a principal in the crime" language was employed embracing every possible case in which she could be guilty as a principal in the second degree. The definition given was full and exhaustive. Nothing could be added to it without error, though it might properly enough be illustrated and explained, that the jury might understand fully the meaning of the language employed, and how to apply it to the facts of the case on trial. This, if done correctly, might be an aid to the jury, and would be entirely unobjectionable.

This definition is immediately followed by the clause to which objection is urged. It is suggested that it is introduced by way of addition, and not as if for the purpose of an explanation of what had preceded it. The language does not necessarily imply this, though it might be so understood—"So, if the murder was perpetrated with her knowledge and consent or connivance, she is a principal." The terms "hence" and "therefore" are sometimes the equivalents of "so," and the latter word is thus understood whenever what follows is an illustration of or conclusion from what has gone before. It remains to consider whether the proposition that if a murder be committed in one's presence and with his consent, such an one has aided and abetted, and is therefore guilty as a principal, or, in other words, is, according to the old law, an accessory at the fact.

Consent, as a substantive, is the synonym of assent, acquiescence, concurrence, and means an agreement or harmony of opinion or sentiment; and so it would here be popularly understood. It does not imply any manifesta-

tion or expression of such concurrence, though this may sometimes be inferred from the connection in which the word is used. There was, however, nothing here to suggest this implication. It could exist without act or utterance, and entirely without the knowledge of the actual perpetrator of the homicide, and in that case it would neither aid nor encourage him to do the fatal deed; and short of this there cannot be aiding or abetting in the sense which the law requires to constitute guilt as a principal in the second degree. Under this instruction, the jury would understand that if they believed from the evidence that the prisoner was present when the murder was committed, and was willing or desirous that the bloody deed should be done, they must find her guilty, though that desire had been kept by her a secret, and was entirely unknown to him who inflicted the deadly blow.

It is plainly not the law that one can be guilty of murder without overt act, who by neither word nor gesture has done anything to contribute to the commission of the homicide or to assist, encourage, or evince approval of it at or before the fact, and of whom it only appears that he was present and knew of the crime and mentally approved it. The silent thought, however wicked in view of the Searcher of Hearts, is not a crime against our laws, but is left by them to another than a human tribunal.

And yet this word *consent* has been used loosely by distinguished sages of the law, in a sense implying more than its proper or its popular import, and doubtless in the same sense in which the learned judge below really intended it to be understood. Thus, Mr. Chitty (1 Crim. Law, 256), "The stroke is constructively given by all who *consent* to it." And Sir Michael Foster, in *M'Daniel's Case* (Foster's C. C. 127), "Persons procuring, contriving, or *consenting*, come within the words aid and command." And again in his learned discourse on accomplices (*id.* 346 and 351). Also Hale's P. C. 374 and 618. The authorities which they cite in support clearly show the sense in which they use this language to

be as we have stated it. No case can be found in all the books to warrant these passages in their most literal, natural, and popular sense.

But if Chitty, Hale, and Foster have employed this word as implying not merely acquiescense of mind, but also the manifestation of it, it does not follow that it can be employed in an instruction to the jury without error. The jury would understand the language addressed to them in its ordinary sense; and thus understood, if it did not give the law correctly, there would be obvious error.

Reversed, and remanded for a new trial.

RAY, C. J.—While I fully concur in the opinion pronounced by the court, I desire to express my own views somewhat more fully upon one point in the decision.

The appellant was charged with murder in the first degree; in other words, with having "purposely and with premeditated malice" killed Mrs. Young, or that she was "aiding or abetting in the crime," or that she "did counsel, encourage, hire, command, or otherwise procure such crime to be committed." The jury found her guilty of murder in the second degree, that is, that she did "purposely and maliciously, but without premeditation, kill" Mrs. Young, or, on the moment's impulse, aided and abetted the killing.

The theory of the State upon the evidence was, that Mrs. Clem was the principal in a conspiracy to bring about the death of Young, by inducing him to accompany her to a secluded spot, where his death should be accomplished. The only evidence offered by the State supported this theory. The jury found her guilty of murder in the second degree, that is, that she did "purposely and maliciously, but without premeditation, kill" Mrs. Young, or that she was without premeditation aiding or abetting in the commission of the crime. Looking at this result, we must say that a charge which informed the jury that if she was present, and the "murder was perpetrated with her knowledge and con-

sent or connivance, she is a principal," was not the law. The finding of the jury acquitted her of any thought or intent of the murder previous to its actual commission. She may only have seen it perpetrated, and in her heart consented, but by no word or act aided or abetted in its commission. Such consent could not make her a principal.

The learned judge who charged the jury well knew that under the evidence she was guilty of murder in the first degree; that is, she either killed Mrs. Young of premeditated malice or aided and abetted in such killing, or she was not proved guilty as charged; and he gave his general instructions to the jury accordingly. It was not his duty, if there had been no error in the charge, when the proof would have sustained a finding of guilty of murder in the first degree, to grant a new trial, simply on the ground that she was convicted of an offense involving a less punishment, and yet by law included in the greater crime, although the evidence did not sustain the finding of the lesser crime. She could not complain of an error in her favor.

If the jury had formed their verdict under the evidence, and either convicted the appellant of murder in the first degree, that is, that she did "purposely and of premeditated malice kill" Mrs. Young or aided and abetted in the crime, we would not disturb the finding; for by such conviction, premeditated malice would be affirmed, together with her guilty intent in being present, and it would be evident that the instruction did not mislead the jury. But the finding precludes us from asserting that the error of law contained in the instruction did not influence the verdict.

J. Hanna, *F. Knefler*, *J. W. Gordon*, and *W. W. Leathers*, for appellant.

J. T. Dye, *A. C. Harris*, *J. S. Duncan*, *A. G. Porter*, *B. Harrison*, *W. P. Fishback*, and *D. E. Williamson*, Attorney General, for the State.

The City of Columbus *v.* The Hydraulic Woollen Mills Company.

Re-training Order.—*Judge of Common Pleas.*—The judge of the common pleas court may grant a restraining order in vacation, without notice, upon emergency, in a cause pending in the circuit court.

Same.—Such order may only be granted until notice can be given and a hearing had thereon; and where such an order was granted, to expire on the second day of the next term of the circuit court, which would be a period of six months;

Held, that the period was too long.

City.—*Street Improvement.—Change of Grade.—Statute Construed.*—The provision of the twenty-seventh section of the act for the incorporation of cities (Acts 1867, p. 33), that when the grade of a street has been once established, it shall not be changed without first assessing and tendering the damages occasioned by the change, refers to damages as well to property outside of the city limits as to that inside.

Same.—*Injunction.*—A hydraulic company operated a woollen mill propelled by water supplied by an artificial race, the water from which was used also in coloring the goods manufactured, pure water being required for that purpose. A city incorporated under said act of 1867 was rapidly cutting a ditch for the draining of its streets, to discharge into said race, which would so contaminate the water thereof with filth as to make it unfit for coloring; and this would be accomplished in two or three days, if not arrested; and it would also carry sand into said race, obstructing the flow of water to the mill. Said city was making said ditch as a part of the work of grading a certain street according to a new and changed grade thereof, a different grade having been previously established, and the damages to said company resulting from such change of grade had not been assessed or tendered. Said race at the point of intersection with the proposed ditch was outside of the city, its margin being the boundary of the city.

Held, that said company was entitled to an injunction to prevent the city from cutting said ditch into the race (the majority of the court basing this conclusion on said provision of section 27 of the act of 1867; Elliott, J., holding that the fact that the city was changing the grade of the street did not affect the question, but that the city had no authority or right to conduct the drainage of its streets into the race, the private property of said company, and thereby destroy the use for which it was constructed, nor could such power be conferred except by the exercise of the right of eminent domain).

APPEAL from the order of the judge of the Bartholomew Common Pleas.

Frazer, J.—The power of the common pleas judge in

vacation to grant a restraining order in a cause pending in the circuit court is questioned. It was certainly competent for the legislature to confer this power, and as a matter of convenience quite necessary that it should be done. The judge of one court is often absent or lives at a distance, while the judge of the other is at hand or easily accessible. No conflict of jurisdiction could arise, for it would not be a case in which one court was interfering with the process of another court, as in *The Indiana, &c., R. R. Co.* v. *Williams*, 22 Ind. 198. The judge of the common pleas is not in vacation the court of common pleas, and so of the circuit judge. But each exercises in vacation whatever power in this respect is conferred by statute as an officer clothed with the special authority, having for that purpose the power which the proper court would have in term, and being, in a certain limited sense, that court for the time being. A master in chancery was not the chancellor or the court, and yet for convenience he had, in vacation, under our former laws, this very authority. Indeed, at one time it was conferred upon the clerk. We think the statute confers the power. 2 G. & H. 131, *et seq.* There is no reason for giving to the language employed such a construction as will confine the power of the judge in vacation to causes in the court of which he is judge. No such restriction is either expressed or implid in the terms employed, unless it may be as to the granting of temporary restraining orders without notice, upon emergency. The word "court" only is there employed, and not "court or judge," as in the former part of the same section (139). But if the term "court" is to be taken literally, then there is no power in vacation, without notice, to grant restraining orders; for in a strictly literal sense, the judge in vacation is not the court, though for certain purposes he possesses its powers, and is for that reason called a *court*. This term must here be interpreted to mean as well a judge in vacation as the court in a proper sense, to avoid a dilemma which the legislature never intended. It cannot be supposed that it was designed to con-

fine the power of granting restraining orders, without notice, upon sudden emergency, to the courts in term.

In this case, a restraining order, without notice, was granted in vacation, on the 12th of June, 1869, to expire on the second day of the next term of the circuit court, which would be a period of more than six months. This was in plain violation of the statute, and for that reason there must be a reversal. By sec. 139 of the code it is provided that the order shall only be granted until notice can be given, and a hearing had thereon. A reasonable time in which to give the notice must of course be allowed, but the period of six months is entirely too long.

The case is also argued upon the merits, as the facts are alleged to be by the complaint. Briefly, this is the case: the plaintiff operates a woollen mill propelled by water supplied by an artificial race, the water from which is used also in coloring the goods manufactured, pure water being required therefor. The defendant is rapidly cutting a ditch for the draining of its streets, to discharge into the race, which will so contaminate the water thereof with filth as to render it unfit for use in coloring, and this will be accomplished in two or three days, if not arrested; that it will also carry sand into the plaintiff's race, obstructing the flow of water to the mill; that the defendant, an incorporated city, is making said ditch as a part of the work of grading Harrison street, according to a new and changed grade thereof, a different grade having been previously established; and that damages to the plaintiff resulting from such change of grade have not been assessed or tendered. The race at the point of intersection with the proposed ditch is outside of the city, its margin being the boundary of the city.

The statute provides that the common councils of cities shall have exclusive power over the streets thereof. Acts 1867, p. 63, sec. 61. But the twenty-seventh section of the same act declares that when the grade of a street has been once established, it shall not be changed without first assessing and tendering the damages occasioned by the change.

Does this refer to damages to property *outside* of the city limits? The language is certainly broad enough to protect property without as well as within from the injury, often very serious, resulting from such changes. We perceive no good reason for making any distinction, and none therefore for a construction which will circumscribe the language of the legislature, limiting the natural import of it so as to deny to property without, that protection which is given to property within the city. The enactment, in its broadest scope, is eminently just, and it is the opinion of the majority of the court that the appellee is protected by it.

Reversed, with costs, and remanded for further proceedings.

ELLIOTT, J.—I concur in the opinion of FRAZER, J., in the reversal of the restraining order granted by the judge in vacation, for the reason stated. And I also concur in the conclusion that the complaint presents facts sufficient to authorize an injunction, but for a very different reason from that stated in the opinion. The complaint shows that the race, into which the city was constructing a sewer for the purpose of drainage, is the private property of the plaintiff, constructed for the purposes stated, and is outside of the city limits, and I hold that, independent of the question of a change of grade of the streets, the city has no authority or right to conduct the drainage of the streets into the race, and thereby destroy the use for which it was constructed. It is true, that the city has exclusive jurisdiction over the streets and alleys within the corporate limits; but that does not confer on it authority to gather the drainage of the streets into a sewer and discharge it upon the private property of a person outside of the limits of the city, to his injury. No such power is conferred by the city charter, nor could it be except by the exercise of the power of eminent domain, to take private property for public use; and in such cases the damages must first be assessed and paid before the property can be appropriated. I cannot see

therefore, that the fact that the city was changing the grade of the street has anything to do with the question.

Indeed, if the race were within the city limits, I should not be prepared to hold that the city, by virtue of its jurisdiction over the streets, could use the race as an outlet to the sewerage of the city to the injury of the plaintiff, without compensation. It would be virtually taking or appropriating private property to the public use, which can only be done upon the assessment and payment of the damages.

S. Stansifer and *F. Winter*, for appellant.

F. T. Hord, for appellee.

GANDOLPHO *v.* THE STATE.

CRIMINAL LAW.—*Indictment.—Receiving Stolen Goods.*—An indictment for receiving stolen goods alleged a felonious larceny of said goods, on, &c., by certain persons named, other than defendant, and that the defendant afterwards, on, &c, "did then and there, unlawfully and feloniously, receive, conceal, and aid in concealing said goods, he then and there well knowing said goods to have been so as aforesaid unlawfully and feloniously stolen, taken, and carried away," &c.

Held, that this was a sufficient allegation of a felonious intent in receiving said goods.

Held, also, that it was sufficiently alleged that the defendant knew, at the time he received the goods, that they had been stolen.

SAME.—In an indictment for receiving stolen goods, knowing them to have been stolen, it is not necessary, under our existing statute, to charge the defendant with having received the goods with intent to defraud any person.

SAME.—*Practice.—Trial on Several Counts.*—An indictment contained three counts, the first for unlawfully, feloniously, and burglariously breaking and entering a manufactory, in the night time, and stealing certain goods therefrom; the second for larceny; and the third for receiving stolen goods, knowing them to have been stolen; it being evident from the face of the indictment that all the counts were based upon the same larceny.

Held, that the prosecuting attorney could not properly be compelled to elect upon which count he would first put the defendant on trial.

Gandolpho *v.* The State.

BILL OF EXCEPTIONS.—*Affidavit for Continuance.*—An affidavit in support of a defendant's motion for a continuance in a criminal action cannot be made a part of the record except by a bill of exceptions.

APPEAL from the Jennings Circuit Court.

Gandolpho, the appellant, was convicted on an indictment for receiving stolen goods, knowing them to have been stolen.

The indictment contained three counts. The first charged the defendant with unlawfully, feloniously, and burglariously breaking and entering the manufactory of certain persons named, known as the "O. and M. Woollen Mills," in the night time, and stealing therefrom certain goods, which were described, on the 31st day of August, 1870. The second count charged the appellant with a larceny of the same goods described in the first count, and at the same date.

The third count alleges a felonious larceny of the same goods, on the 31st of August, 1870, by William Hopper, James Redman, Thomas Foungate, and Peter Stein; and that the appellant, afterwards, on the 8th day of September, 1870, "did then and there unlawfully and feloniously receive, conceal, and aid in concealing, said goods, he then and there well knowing" said goods "to have been so as aforesaid unlawfully and feloniously stolen, taken, and carried away," &c.

A motion was made to require the prosecuting attorney to elect on which count of the indictment he would first put the appellant on trial, which was overruled.

The court also overruled a motion made by the appellant to quash the several counts of the indictment. To these rulings the appellant excepted. Not guilty was then pleaded, and the case was tried by a jury, who found the appellant guilty as charged in the third count of the indictment, assessed his fine at one cent, and that he be imprisoned in the state prison two years, and be disfranchised and rendered incapable of holding any office of trust or profit for five years. They also found him not guilty as charged in the first and second counts of the indictment.

A motion for a new trial and a motion in arrest of judgment were overruled, and excepted to, and judgment was rendered on the verdict.

ELLIOTT, J.—It is urged as an objection to the third count of the indictment, that it does not allege that the goods were received by the appellant with a felonious intent. The indictment alleges, that the appellant "unlawfully and feloniously received and concealed the goods." This is a sufficient allegation of the felonious intent with which the goods were received and concealed.

Another objection urged to the third count of the indictment is, that it does not charge the appellant with receiving the goods with intent to defraud any person.

It was held, in *Pelts* v. *The State*, 3 Blackf. 28, that an indictment for receiving stolen goods, under the statute of 1829, should aver that the goods were received with intent to defraud the owner. But that case is not in point here. There the statute on which the indictment was founded declared that any person "who shall buy, conceal, or receive any stolen goods and chattels, knowing the same to be stolen, *with intent to defraud the owner*," *&c.* Here the statute on which the indictment is based omits the words which we have italicised above; it declares that "every person who shall buy, receive, conceal, or aid in the concealment of any stolen property, knowing the same to have been stolen, shall, upon conviction thereof," &c. The indictment charges the offense in the language of the statute, and is sufficient.

It is also claimed that the indictment does not sufficiently allege that the appellant knew, at the time he received the goods, that they had been stolen. There is no foundation for this objection. The indictment, after alleging that the appellant received and concealed the goods on the 8th of September, 1870, contains the averment, that "he, the said Peter Gandolpho, then and there well knowing said" goods "to have been as aforesaid unlawfully and feloniously

stolen," &c. It would be difficult to frame any other form of averment that would more fully and directly express the guilty knoweldge in the receipt of the stolen goods.

The ruling of the court in refusing to require the prosecuting attorney to elect on which count of the indictment he would first put the appellant on trial, is also objected to. There was no error in the ruling. *Keefer* v. *The State*, 4 Ind. 246. It is evident from the face of the indictment that all the counts are based on the same larceny.

It is claimed that the court erred in refusing to continue the cause on the appellant's motion based on an affidavit. The affidavit was not properly a part of the record, and could only be made so by a bill of exceptions, which was not done; and although the clerk has copied into the record a paper purporting to be an affidavit for a continuance, it is not properly there, and we cannot notice it as a basis of error.

It is also insisted that the verdict of the jury is not sustained by the evidence. We cannot say so. The evidence shows that the woollen mills were broken open, and the goods described in the indictment stolen therefrom, on the night of the 31st of August, 1870. It also strongly tends to prove that the appellant was in the vicinity of the mills the evening of the larceny, in company with some of the other parties who had been convicted on an indictment for the larceny. Indeed, one witness, who was also accused of participating in the larceny, testified that the defendant went to the mills that night in company with the parties named; and if his evidence is to be credited it would clearly justify the defendant's conviction of the larceny.

The evidence further shows that afterwards, on the 7th or 8th of September, the appellant and one of the other parties, who has since been convicted of the larceny, were in possession of a trunk containing a part of the stolen goods; the appellant claimed the trunk as his, and made a false statement in reference to what it contained. Under such a state of facts, we cannot say that the evidence did

not justify the jury in finding the appellant guilty of receiving the goods, knowing them to have been stolen.

The judgment is affirmed, with costs.

J. Bundy, for appellant.

D. E. Williamson, Attorney General, for the State.

WILSON *v.* POOLE.

ABATEMENT.—*Practice.*—Where an answer in abatement is not verified by affidavit, it seems that it would be proper to refuse to hear an objection to it on that ground after the jury has been sworn to try the cause.

SAME.—*Amendment.—Reswearing Jury.*—Where a plea in abatement had been stricken out for want of verification by affidavit, after the jury had been sworn to try the cause, but before any further step had been taken;

Held, that it was too late for the defendant to ask leave to supply the verification.

Held, also, that it was not necessary to reswear the jury to try the remaining issues.

SAME.—*Pleading.—Evidence.—Action to Quiet Title.*—In an action to quiet title to real estate, matter in abatement cannot be given in evidence without having been specially pleaded.

CONSTRUCTION OF WRITTEN INSTRUMENT.—*Evidence.*—A street contractor was permitted, over objection, to testify that his written bid to grade a certain street for one dollar a foot, which was in evidence, meant that he thereby proposed to do the work for fifty cents per front foot of the property on each side of the street.

Held, that this was error; but as the proper legal construction of the writing was the same as the construction given by the witness, the error was harmless.

CITY.—*Street Improvement.—Precept.—Affidavit.*—A lot in a city was sold under a precept for the collection of an assessment for the improvement of a street by grading and graveling, issued upon an affidavit of the contractor stating that, *under the estimate* made by the city engineer, $83.84 was assessed against this lot, and that the owner, for the space of twenty days after the date of the estimate, had failed and refused, and still refused to pay the same, except the sum of sixty dollars, which he had paid. The contractor's bid for making the improvement was one dollar per foot, and at that price it was contracted and the work was done. The front line of said lot was eighty-two and one-half feet long.

Held, that no appeal from the precept was necessary, in order to raise the question of the authority of the council to issue it; but that it was absolutely void, and the city treasurer could not, under it, pass title by a sale of the property.

APPEAL from the Fountain Circuit Court.

Suit by the appellee against the appellant, the complaint alleging that the appellee is the owner in fee simple of a certain lot in the city of Attica, and entitled to the possession thereof, a deed of conveyance of which, with warranty, from Alonzo Chandler and Elizabeth Chandler to the appellee, dated March 16th, 1868, is made an exhibit of the complaint; and that the appellant claims title in fee simple to said real estate, adverse to the appellee. Prayer, that the appellee's title be quieted.

The appellant answered in four paragraphs, first, the general denial; second, that the appellant is the owner of said lot in fee simple, and entitled to the possession thereof, and holds it by virtue of a deed of conveyance from the city of Attica, under a lien for street improvement that attached August 20th, 1866, a copy of which deed is filed with the answer; and the appellant prays that his title be quieted. No question arising under the third paragraph is discussed in the opinions. The fourth paragraph sets forth that there was another action pending in the same court between the same parties, involving the same issues. This paragraph was not sworn to. The appellee replied by the general denial. Trial by jury. After the jury had been sworn to try the cause, the fourth paragraph of the answer was stricken out on motion of the appellee, to which ruling the appellant excepted. The appellant then asked leave to supply the verification of the fourth paragraph, which the court refused, and the appellant excepted.

Verdict for the appellee. A motion for a new trial was overruled, and the appellant excepted. Judgment was rendered on the verdict.

FRAZER, J.—This case presents a number of questions of practice.

1. An answer in abatement was stricken out after the jury was sworn, because it was not verified by affidavit. Was this error?

The appellant relies on *Bradley* v. *The Bank*, 20 Ind. 528. That case only decides that *after* a trial it is too late to object that the answer was not verified. We are not aware of any reported case involving the precise point before us, and the industry of counsel has not discovered any. It may happen in the hurry of business in the lower courts (though it should not), that the verification is forgotten by the pleader, and its absence overlooked by his antagonist. The law has no inclination to favor dilatory pleadings, for they do not go to the merits of the case. But it would be trifling to allow a party to speculate upon the result of a verdict, and, after it is found against him, interpose the objection that the answer was not verified. But when no step has been taken beyond swearing the jury, no great inconvenience can result, nor any injury to the opposite party, by allowing the objection to be made. He can at once interpose an application for leave to add the verification, and thus protect himself and save his answer. We are, however, of opinion that the better practice would be to refuse to hear the objection after the jury has been sworn; but inasmuch as the error, if any, was harmless, it is not available in this court.

2. After the answer in abatement had been stricken out, as above stated, the appellant asked leave to supply the verification, but was refused; and this is complained of. He was too late in this application, after the pleading had been stricken from the record. It was then out, and could not be brought back by an affidavit.

3. It is urged that there was error in not reswearing the jury after this pleading was stricken out. There is nothing in this. No single issue had been changed, and no new one had been formed. One issue, existing when the jury was sworn well and truly to try *all* the issues, had been stricken out, but the oath which had been taken embraced each of

those which remained. The point is without even the slightest technical reason to support it.

4. The witness Hanna was allowed to testify, over the appellant's objection, as to what was meant by his bid in writing. This was error; but it was harmless, for the reason that the writing itself very plainly meant just what the witness swore that he intended by it, and was not, under the law, susceptible of any other construction, as we think. See 3 Stats. (Davis), 99 sec. 69.

5. The appellee was allowed to state as a witness the price which he had actually paid for the lot. This was error; for the appellant had not introduced any evidence whatever which tended to raise any question upon the subject. The tendency of this item of evidence would be to elicit the sympathies of the jury in behalf of the appellee; and so, unless it affirmatively appears that a right result was, beyond question, reached by the verdict, this will reverse the judgment.

6. The precept upon which the lot was sold for the unpaid assessment was issued upon an affidavit of the contractor stating that the work was done according to contract, and that, *under the estimate* made by the city engineer, eighty-three dollars and eighty-four cents was assessed against this lot, and the owner, for the space of twenty days after the date of the estimate, had failed and refused, and still refused, to pay the same, except the sum of sixty dollars, which he had paid. The bid of the contractor for grading the street was one dollar per foot, and at that price it was contracted, and the work done. This would of course impose an assessment of only fifty cents per front foot upon the property upon each side of the street. The front of this lot was only eighty-two and one-half feet, and the sum for which it was liable could only be forty-one dollars and twenty-five cents, all of which, and nearly twenty dollars more, had been paid when the precept issued, as appeared by the affidavit. All this information was before the council when the precept was ordered, and by law they and the contractor as well must

be held to have known that nothing remained unpaid against this lot. The affidavit of the contractor carefully avoided endorsing the estimate of the engineer as having been "duly made," that is, correctly made upon the basis of the contract, as the law requires. See 3 Stats. (Davis), 102. Without such an affidavit as the statute directs, the council had no jurisdiction to issue the precept. It issues without notice to the owner of the property, and the rule in like cases is, that there must be a strict compliance with the statute in order to bind the property. The doctrine applicable to sales for taxes must govern in cases of this kind. But it is argued that an appeal from the precept is provided for by statute, and that having failed to appeal, the owner of the property is forever prohibited from making any question as to the authority to issue the precept. This argument would possess greater force in a case where the precept had been issued under such circumstances as the law requires to exist in order to warrant its issue. The case, however, is one in which, under the circumstances, it issued without any authority whatever. It was therefore not voidable merely, but void, and no appeal was necessary to get rid of it. Being void, it had no more virtue or force than the blank paper upon which it was written; and the treasurer could not, under it, pass title by a sale of the property. Causes concerning the validity of tax titles under laws requiring the previous judgment of a court, of which the reports are full (we cite only *Thatcher* v. *Powell*, 6 Wheat. 119), maintain this proposition so uniformly, that it can hardly be deemed open for argument anywhere. It matters not that the lot-owner *may* interpose by appeal to arrest the proceedings. It is only by virtue of the statute and by a strict compliance with all its material requirements that the officers of the city could have any power to alienate the property. This of itself shows that the result reached was unquestionably right.

Affirmed, with costs.

ON PETITION FOR REHEARING.

WORDEN, J.—We are satisfied with the conclusion arrived at by the late court, that the judgment below should be affirmed, and, therefore, that the petition for rehearing should be overruled; but we are not quite satisfied that the same strictness should be applied to sales made for improvement of streets, &c., under the authority of municipal corporations, that is required in sales for taxes, as is intimated in the original opinion in this cause.

We think the sale made under the circumstances shown in the record, and stated in the original opinion, was a nullity; but we think that conclusion may be well maintained without resorting to the extreme strictness usually applied to tax sales.

A rehearing, however, is pressed more especially upon the ground that the court is supposed to have overlooked, or not fully considered, a question arising upon the introduction of evidence. The defendant below, on the trial, offered evidence tending to show that a prior action was pending between the same parties (they being reversed), involving the same cause. The evidence was excluded. There was no plea in abatement under which the evidence could have been given, and the question presented is, whether it could have been given under the general denial. The statute applicable to actions for the recovery of real estate and for quieting the title thereto provides, that "the answer of the defendant shall contain a denial of each material statement or allegation in the complaint; under which denial the defendant shall be permitted to give in evidence every defense to the action that he may have, either legal or equitable." 2 G. & H. 283.

If the words "every defence to the action, * * either legal or equitable" are to be construed as embracing matters of abatement, as well as matters in bar, then, of course, the court below erred in excluding the evidence. But we think the language employed does not embrace matters of

abatement. The following extract from Mr. Chitty will show the general signification of the word "defense" as applied to legal pleading: "After the statement of the appearance follows that of the *defense*, which has been defined to be the denial of the truth or validity of the complaint, and does not merely signify a justification. It is a *general* assertion that the plaintiff has no ground of action, and which assertion is afterwards extended and maintained in the body of the plea." 1 Chitty Plead. 428. We think the word "defense" as used in the above statute includes every matter in bar of the action, whether of denial or of confession and avoidance, but not matter of abatement. The pendency of a prior action between the same parties for the same cause is no "defense" to a subsequent action, but it is merely a reason why the defendant in the subsequent action should *not be compelled to make his* "defense" therein.

This construction is not only right in itself, but it is necessary to preserve harmony in the practice in reference to pleading matters of abatement. It has been held that sec. 200, p. 706, R. S. 1843, requiring pleas in abatement to be sworn to without exception, is continued in force. *The Indianapolis, &c., R. W. Co.* v. *Summers*, 28 Ind. 521. No good reason occurs to us why matters in abatement of actions of this character should not be pleaded and sworn to, as well as in other actions. We suppose the legislature intended, by the provision above quoted, to assimilate this class of actions to the old action of ejectment, in which the general issue was pleaded, and under which all legal matters in bar could be given in evidence, but not matters of abatement; enlarging the common law right of defense, however, by permitting equitable as well as legal defenses to be thus given in evidence under the general denial.

The petition for rehearing is overruled.

J. Buchanan, for appellant.

J. McCabe and *M. M. Milford*, for appellee.

The State *v.* Solomon.

Criminal Law.—*Disturbing Lawful Assemblage.—Statute Construed.*—In order to constitute a violation of the statute for the protection of religious meetings, &c., (Acts 1859, p. 126, and Acts 1865, Spec. Sess., p. 201) the sale, not merely of articles specifically named in the statute, but of any other articles, is sufficient, if the circumstances otherwise bring the case within the statute.

APPEAL from the Marion Criminal Circuit Court.

Pettit, C. J.—This case was commenced before a justice of the peace, and found its way to the above court on appeal by the defendant. The charge is, "that Charles Solomon, late of said county, on the 15th day of August, in the year 1869, at the county aforesaid, did then and there unlawfully keep and maintain a building known as a warehouse, in which the said Charles Solomon did then and there keep and expose for sale, liquors, cigars, tobacco, candies, peaches, melons, mineral water, and other articles, the said building and the articles then and there kept for sale being within one mile of a collection of inhabitants of the State of Indiana for the purpose of religious worship."

This prosecution is founded on the first section of an act approved November 30th, 1865, entitled, "An act to amend an act entitled 'an act for the better protection of religious meetings, agricultural fairs, and other lawful assemblages of the people,' approved March 3d, 1859." See Acts of 1865, Spec. Sess., p. 201.

The cause was submitted to the court for trial on the following agreed state of facts:

"That the defendant, with one Charles Dietrich, rented of Joshua Trout a warehouse in the town of Acton, in the county of Marion and State of Indiana, in the latter part of the month of July, A. D. 1869; that the said warehouse in said town of Acton and the said town of Acton lie within one mile of the camp-ground of the Methodist Episcopal Church in Franklin township, in said Marion county;

that the Methodist Episcopal Church and the people belonging thereto held a camp-meeting at and on said camp-ground, commencing on the 11th day of August, in the year 1869, and continuing thenceforward for every day of the next ensuing two weeks; that the said defendant, with the said Dietrich, procured a license from the United States to keep an eating house in said warehouse in said Acton, from the 1st day of August, 1869, until the first day of May, 1870; that said defendant and Dietrich also procured a license from the town of Acton, which is an incorporated town under the general laws of the State of Indiana on that subject, to keep an eating house in said warehouse in the town of Acton, and paid for said license the sum exacted for the same by the authorities of said town; which said license extended from the 1st day of August until the 1st day of September, in the year 1869; that said defendant, with said Deitrich, did, on the 15th day of August, 1869, keep and maintain an eating house in said warehouse, and did then and there keep and expose for sale in said building, cigars, tobacco, candies, peaches, melons and other articles, not including mineral water or intoxicating liquors of any kind; and that said warehouse so kept was within one mile of said camp-ground and camp-meeting, where a large number of citizens and inhabitants of the State of Indiana were assembled for the purpose of worship. And the defendant further admits and agrees that said eating house was not opened by him and said Dietrich until the 11th day of August, 1869; and it was finally closed on the last day of said camp-meeting, and has not been kept open as an eating house since.

"It is further admitted and agreed that the sales of cigars and tobacco were in small quantities, not amounting in all to more than one hundred dollars. It is further agreed that said Solomon had no established place of business, but had been engaged in attending public meetings with such articles as are above specified, for sale to the people attend-

ing the same; and that he was at Acton, as above stated, only for and during said camp-meeting."

On this evidence, the court found the defendant not guilty, and discharged him, to which the State excepted, and saved the question for our consideration as to the sufficiency of the evidence and the correctness of the finding of the court below thereon.

We have given the opinion of the court below a careful consideration, but cannot agree with it. The evidence, to our mind, clearly brings the case within the letter and spirit of the amendment of 1865, above referred to, and does not show it to be within any of the exceptions contained in section second of the original act of 1859. It is true, that the articles sold and for sale are not those that are specifically named in the statute, but they are "other articles" spoken of in the law. The object of the law was not alone to prevent the sale of drinks, but of all "other articles," unless the vendor had permission, was owner of the real estate, or was carrying on his regular business, at the usual place of transacting the same, as provided for in section second of the act of 1859. See Acts 1859, p. 126.

The defendant should have been convicted on this evidence.

Judgment against the appellee for costs.

D. E. Williamson, Attorney General, *D. V. Burns*, *W. Morrow*, and *N. Trusler*, for the State.

J. W. Gordon and *W. A. Thompson*, for appellee.

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Musselman v. Kent and Others.

Demurrer.—*Defect of Parties.*—The question of a defect of parties plaintiffs cannot be raised by a demurrer to the complaint for failure to state sufficient facts.

Musselman *v.* Kent and Others.

TRUST.—*Fraud.*—*Statute of Limitations.*—Certain land mortgaged to the State to secure a loan from the sinking fund was sold by the State upon the failure of the mortgagor to pay interest. He was about to reinstate the mortgage within the time allowed therefor by law, when, he being largely in debt and insolvent, and intending to delay his other creditors, which intention was known to the purchaser, it was verbally agreed between the mortgagor and purchaser, for the purpose of such delay, that the former should not reinstate the mortgage (and he did not do so); that the latter should hold the land in trust for the mortgagor and permit him to redeem it whenever his relations with his creditors would allow him to do so with safety; and that the mortgagor should pay the purchaser whatever amount the latter might pay the State for interest, which he did for a time, when said purchaser paid the amount due the State, and received from it a deed.

Held, that this was an implied trust under the statute; and the conveyance to said purchaser was void as to said creditors, who were entitled to have the property applied to the payment of their debts without offering to refund the amount paid by said purchaser, who had no lien therefor on the proerty.

Held, also, that the right of said creditors to have the fraudulent conveyance set aside, including prior judgment-creditors and one who held a mortgage on said property executed prior to said conveyance, was limited to six years from the date at which their cause of action accrued.

APPEAL from the Carroll Circuit Court.

DOWNEY, J.—The complainants are judgment-creditors of Green, one of the defendants, except one of them, who held a mortgage on the real estate in question. The action was brought to reach and subject to the payment of their claims, an interest which they allege Green had in a lot in the city of Logansport. Demurrer to the complaint, which was overruled. Answer by Musselman in nine paragraphs. Demurrers sustained to the second, fifth, sixth, seventh, eighth, and ninth. Replies to the third and fourth, by general denial. Answer by Haney, and issue thereon. The case was commenced in the Cass Circuit Court, and, after two changes of venue, was finally tried in the Carroll Circuit Court, where there was a special finding by the jury, in answer to interrogatories, which, by agreement of the parties, was to be regarded as a special verdict, and on which final judgment was rendered for the plaintiffs.

The first question is as to the sufficiency of the complaint. After alleging the recovery of the judgments against Green,

and the issuing and return of execution thereon unsatisfied, and the execution of a mortgage on the lot in favor of one of them, by Green, the complainants allege, that in 1837, Green was the owner of the real estate in fee simple; that he and his wife mortgaged the same to the State to secure a loan from the Sinking Fund; that having failed to pay the interest on the loan, the lot was sold and bid in by the State; that the State re-offered it for sale, and it was bought by Musselman for the amount of the debt due from Green; that Green then owed the several debts due to the plaintiffs, though they were not all reduced to judgments; that he owed many other debts, and was insolvent; that the parties holding the mortgage were then prosecuting a suit to foreclose the mortgage; that Green was about to reinstate said mortgage, which he had a right to do within sixty days, by paying to the State what was due to her, and to Musselman, or to the State for him, what was due to him on his purchase, and had the money ready, and was about sending the same to Indianapolis, when it was agreed between Musselman and Green that Musselman should hold the property, under his purchase, in trust for Green, and should allow him to redeem the same at any time afterwards when the relations of Green with his creditors would allow him to do so with safety; and that in the meantime Green would pay to Musselman whatever amount he should pay to the State for interest; that Musselman knew of the pecuniary condition and embarrassment of Green; that the intention of Green was to delay the foreclosure of the mortgage and to delay his other creditors in the collection of their debts, all of which was known to Musselman; that Green made payments on account of the interest of the Sinking Fund debt; that in December, 1859, Musselman paid off the amount due from him to the State and received a deed for the lot; that up to this time and afterwards, Green occupied one of the store-rooms in the building on the lot and rented the residue, paying to the appellant the interest of the debt to the State, and that he continued to recognize the trust;

that in 1860, they accounted concerning the principal and interest of the debt and expenses, and that there was found due to Musselman seven hundred dollars, computing interest at ten per cent., with which rate of interest Musselman was dissatisfied, because the risk was too great, and insisted on being paid one hundred dollars per year; that the premises were then renting for three hundred and sixty dollars a year; that at this time Musselman demanded that a written contract should be drawn up in the form of a lease to the wife of Green, at a rental of one hundred dollars per year, by which he would appear to be the owner and get fifteen per cent. for his money; that when a lease was prepared he objected to it because it gave Mrs. Green the right to purchase the property within the year for seven hundred dollars. He did, however, prepare and execute to Mrs. Green a lease for two years, under which Green occupied, paying one hundred dollars a year, and also the taxes on the property. In the fall of 1863, Musselman paid to Mrs. Green five hundred dollars, and she and her husband executed to him a quitclaim deed for their interest in the lot, and from this time forward appellant rented the property, and received the rents, Green being one of his tenants.

It is further alleged that Musselman afterwards mortgaged the lot to Haney, to secure the payment of five thousand dollars; that this was done to deceive the creditors of Green, and with a full knowledge of the facts by Haney; that Musselman owned other property of the value of one hundred and fifty thousand dollars, out of which Haney could make his debt.

The complaint also states the amount of rents received by Musselman, and that they amount to more than the money which he had paid out.

The prayer of the complaint is, first, that the lot be sold for the payment of the judgments and the mortgage, the plaintiffs agreeing to claim no priority among themselves.

Second, that Musselman be charged as trustee, and made to account for the rents received by him.

Third, that the mortgage to Haney be set aside as fraudulent, or, if the court shall deem him without fraud, that he be required to proceed at law to collect his debt from other property of Musselman before resorting to the lot in question.

Fourth, that Musselman be enjoined from selling or incumbering said premises, and on sale thereof that he unite in a deed therefor with his wife, conveying all their rights, with a clause against the incumbrance of Haney.

Fifth, that the deed from the State to Musselman and the deed from Green and wife to him be declared fraudulent and set aside.

There is also a prayer for general relief.

It is claimed by the appellant, that as relief is asked against Mrs. Green, she should have been made a party to the suit, and this is undoubtedly true. But the demurrer to the complaint was for the reason that it did not state facts sufficient to constitute a cause of action. To raise this question, the demurrer should have been for the statutory cause, that there was a defect of parties, and it should have named the person omitted. *Collins* v. *Nave*, 9 Ind. 209; *Mandlove* v. *Lewis*, *id.* 194; *Gaines* v. *Walker*, 16 Ind. 361.

Again, it is urged that the complaint is bad because it does not show such a trust as is valid under the statute on that subject. It is not alleged that the agreement between Green and Musselman, upon which it is claimed by the appellees the trust arises, was in writing, as required by the statute in the creation of trusts other than those which arise by implication of law, and no copy of any such agreement is made part of the complaint and filed with it. At common law, where a contract required by the statute of frauds to be in writing was declared on, it was not necessary to show in the declaration that the contract was in writing. But under our code, if the contract or a copy of it is not filed with the complaint, it will be presumed that the contract was not in writing, and the pleading setting up a contract in such a case will be held defective, on demurrer,

unless it show that there was such a writing as required by the statute. *Harper* v. *Miller*, 27 Ind. 277. If, then, the complaint were to be viewed as setting up and relying upon an express trust only, we should be compelled to hold it bad. But we do not so regard it.

Does the complaint show a trust "by implication of law"? When a conveyance, for a valuable consideration, is made to one person, and the consideration paid by another, no use or trust arises in favor of the latter, but the title rests in the former, with some exceptions. 1 G. & H. 651, sec. 6.

One of the exceptions is, that every such conveyance shall be presumed fraudulent as against the creditors of the person paying the consideration therefor; and when a fraudulent intent is not disproved, a trust shall, in all cases result in favor of creditors. 1 G. & H. 651, sec. 7.

It is true that Green paid no money as a consideration, but it alleged that he had a right to have the sinking fund mortgage reinstated, and thus save his property; that he was about to do this; and that he gave up this right, which was a valuable one. This we think was the payment of a consideration within the meaning of the sections of the statute above cited. It was an interest in the lot which the creditors had a right to follow, if it was conveyed away by him under such circumstances as would render the transaction fraudulent according to the statute against conveyances to defraud creditors.

The allegations of the complaint are amply sufficient to show the transaction fraudulent as against the creditors of Green. It is alleged that the purpose was to hinder and delay the creditors of Green in the collection of their debts, and that Musselman participated in it with a full knowledge of the facts. This rendered the transaction fraudulent as to the creditors of Green. Although it is provided in the statute declaring what lands shall be subject to execution, 2 G. & H. 263, sec. 526, that lands fraudulently conveyed with intent to delay or defraud creditors, and also land and any estate or interest therein holden by any one in

trust for, or to the use of, another, are liable to all judgments and attachments, and to be sold on execution against the debtor owning the same or for whose use the same is holden, yet it is held that judgment-creditors may maintain an action, before selling the property on execution, to have the fraudulent character of the conveyance declared, and to remove it out of the way. *Pennington* v. *Clifton*, 11 Ind. 162, and other cases cited in that opinion.

The complaint is framed as if it were against an ordinary trustee, seeking an account, &c. But, in our opinion, a person standing in the position of fraudulent grantee is not entitled to so much consideration. If the transaction was fraudulent, it was void as to the creditors, and they were not bound to refund the amount which he had paid, nor can he have a lien therefor on the property. It cannot be admitted that the payment of part or even the full value of property can purge the transaction of its fraudulent character, if it was not made in good faith. *Rogers* v. *Evans*, 3 Ind. 574.

We think there was no error in overruling the demurrer to the complaint.

The next question is upon the ruling of the court in sustaining the demurrer to the paragraphs of the answer of Musselman. The second paragraph is as follows: He says that the pretended fraud charged in the complaint accrued more than six years next before the bringing of this suit.

The statute of limitations looks to the time when the cause of action accrues as the date from which the time is to be computed within which the action may be commenced. It is not alleged that the cause of action did not accrue within six years before the commencement of the suit. We approve also this action of the circuit court in holding this paragraph of the answer bad.

The next question is as to the correctness of the action of the circuit court in sustaining the demurrers to the fifth, sixth, seventh, eighth, and ninth paragraphs of the answer of Musselman. The fifth paragraph is as follows: "John

T. Musselman, one of the defendants, for answer to the claim of Edward M. Anderson, says that said plaintiff's cause of action, as alleged in the complaint, has not accrued within six years next before the commencement of this suit, and that the said plaintiff had knowledge of all the facts set up in the complaint for more than six years before the commencement of this suit." The sixth, seventh, eighth, and ninth paragraphs are the same in form, but are addressed separately to the claims set up by the other plaintiffs. The statute of limitations requires actions for relief against fraud to be brought within six years. 2 G. & H. 156, sec. 210, cl. 4. We think this was an action of that character, and that the limitation of six years was a good bar to the action. It is claimed by the appellees that the action was for the collection of the judgments and the mortgage, and that it would not be barred until after the lapse of twenty years. We cannot so regard it. Musselman was not a party to the judgments or to the mortgage. The sole object of the suit, so far as he was concerned, was to have the transaction declared fraudulent by virtue of which he held the property. If the suit was on the judgments, as causes of action, then copies of them should have been filed with the complaint. This was not done. Judgments had already been rendered against Green. The relief sought was to come from Musselman when he should be compelled to yield up to the creditors that which he had acquired by fraud.

It is also claimed that in cases of trust the statute does not run, but this is true only of trusts of a certain character. Those technical and continuing trusts of which courts of chancery alone had jurisdiction are of this character. *Smith* v. *Calloway*, 7 Blackf. 86.

We do not think the trust which the law forces upon the party in such a case as this is exempt from the operation of the statute. We think the demurrers should have been overruled, and that it was error to sustain them.

There were other questions raised during the progress of

the cause, after the stage at which these demurrers were sustained; and the rulings of the court upon them are assigned for error; but it is not necessary that we should examine them, as the case will probable assume new forms hereafter.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

D. D. Dykeman and *W. Z. Stuart*, for appellant.

D. D. Pratt and *C. B. Lasselle*, for appellees.

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ABDIL *v.* ABDIL and Others.

JUDGMENT.—*Collateral Proceeding.—Jurisdiction.*—Where a judgment is rendered by a court of superior jurisdiction, having jurisdiction of the subject-matter, and having acquired jurisdiction of the parties, which, in the absence of a contrary showing, it will, in a collateral proceeding, be presumed to have done, such judgment, though rendered for the plaintiff upon an insufficient complaint, is binding upon a party thereto and conclusive of his rights therein adjudicated, until reversed or otherwise set aside as to him.

SAME.—*Withdrawal of Appearance.—Recovery of Real Estate.*—A judgment of the circuit court against a defendant in an action commenced before a justice of the peace on a complaint to recover possession of land for non-payment of rent, rendered after said defendant, having filed an answer denying the relation of landlord and tenant and claiming title to an estate for life in the premises in himself, withdrew his appearance, cannot bar a subsequent action by said judgment-defendant as owner of said life estate to recover possession of the land from the judgment-plaintiff in said former action.

APPEAL from the Fountain Circuit Court.

WORDEN, J.—This was an action by the appellant against the appellees to recover possession of certain real estate, claiming a life estate therein. Issue was joined and a trial had, resulting in a verdict and judgment for the defendants.

Demurrers were respectively overruled to the second and third paragraphs of the answer, and these rulings only, are assigned for error.

The second paragraph of the answer sets up, in bar of the action, the proceedings and judgment of the Fountain Circuit Court, in an action between the same parties, in relation to the same property, in which it was adjudged by the court, in substance, that Hiram Abdil, the appellant, had no interest, legal or equitable, in the property, but that the same of right belonged to Irad Abdil, one of the appellees, setting aside certain conveyances therein specified, and appointing a commissioner to make a conveyance to said Irad, which was accordingly done, and the commissioner's deed approved by the court. The record thus pleaded is the same as was brought before this court on appeal in the case of *Abdil* v. *Abdil*, 26 Ind. 287, where the judgment below was reversed as to Emily E. Abdil, but not as to Hiram, who did not appeal. The judgment thus pleaded stands, as to Hiram, as if no appeal had been taken.

We do not perceive any valid reason why the judgment thus pleaded is not a bar to the action. The court had jurisdiction over the subject matter, and will be presumed, in the absence of a showing to the contrary, to have acquired jurisdiction over the parties defendants, although it does not affirmatively appear that process was served or notice published. This legal presumption is strengthened in this case by the following passage in the judgment of the court: "By agreement of the parties on file in this cause, the said Hiram is to retain the possession of said property for six months from the date hereof, the said Hiram making all such necessary repairs as will insure the property from injury or decay."

It was said by this court, when the appeal of Emily E. Abdil was being considered, that "we find nothing in the complaint justifying the decree of the court vesting the title of the real estate in the plaintiff, and appointing a commissioner to make a deed." The complaint in the cause was

long and somewhat complicated, and sought the relief which was obtained; and we are not prepared to say that it did not state facts sufficient to authorize the judgment which was rendered; but if it did not, the judgment was not therefore void, but simply erroneous, and cannot be successfully attacked when collaterally brought in question, as in this case. The judgment thus pronounced by a court having jurisdiction of the parties and the subject-matter, though it may be erroneous, is binding upon the parties thereto and conclusive of their rights, until reversed or otherwise set aside.

If the plaintiff herein acquired any new right to the property since the judgment, he should have set it up by way of reply.

The third paragraph also set up a former judgment of the Warren Circuit Court, for the recovery of the property in question by the said Irad and his wife, against the said Hiram, in an action between them. The record pleaded in this paragraph shows that Irad and his wife commenced an action against Hiram, before a justice of the peace, claiming that said Irad rented the property in question to the said Hiram, and that Hiram failed to pay the stipulated rent after due notice, and praying for a recovery of the possession of the property. Process was duly served in this action, and Hiram appeared thereto, and answered, first, by general denial, and second, admitting his possession of the property, and denying that the plaintiff therein had any right, title, or interest in it, or any right whatever to the possession thereof, and claiming that he himself was entitled to a life estate therein, and that his daughter, Emily E. Abdil, was the owner of the fee, setting out the source of their titles, and denying that he had ever rented the property from said Irad, or in any manner acknowledged his right thereto. He alleged, also, that the title to the property would arise on the trial of the cause, and therefore that the justice would have no jurisdiction, and asked that the cause be certified to the Fountain Circuit Court, which, the answer being

sworn to, was done by the justice. Emily E. Abdil was made a party defendant, and set up her defense, the same in substance as that set up by her father. On the application of Hiram, the venue was changed from the Fountain to the Warren Circuit Court. Replications were filed in denial of the special matter thus set up by said Hiram and his daughter. Trial by the court, and finding for the plaintiff. New trial granted under the statute, on motion of defendants. Afterwards, on the calling of the cause for trial, the said Hiram withdrew his appearance, was called and defaulted, and the issued thus joined was submitted to a jury for trial, who returned a verdict for the plaintiff; and the court thereupon adjudged that the plaintiffs therein (the said Irad and his wife) were the owners of, and entitled to the possession of, the property. Afterwards a new trial was granted as to said Emily E., and the cause dismissed as to her, but the judgment remained undisturbed as to said Hiram.

This statement of the record pleaded shows that it can be no bar to the action under consideration. The complaint, we have seen, was simply to recover possession of the property, by a landlord against his tenant, because of failure to pay rent. If the relation of landlord and tenant existed between the parties as alleged, the tenant could not dispute his landlord's title, while that relation existed. But the defendant in that suit did file an answer denying that that relationship ever existed, and setting up title to an estate for life in the premises in himself, and on this answer issue was joined, and the cause once tried, but a new trial was granted. Had the cause been finally tried upon this issue, and a verdict found for the defendant, followed by judgment, we are by no means prepared to say that the judgment would not have been a bar to the action under consideration. But while the cause was pending for trial, the defendant therein, the said Hiram, by leave of the court, on motion, withdrew his appearance to the action. We think that the withdrawal of his appearance took with it his pleadings, and left the case to stand as if no pleadings

had been filed by him. The record set out is not inconsistent with this view; for it recites that the issue (in the singular) being joined, the cause was submitted, &c.; that is, the issue remaining in the cause formed on the pleadings of the other defendant. The case as against Hiram was a simple judgment by default, on a complaint that did not involve any question of title, and cannot, therefore, be a bar to this action. We think the court below erred in overruling the demurrer to this paragraph of the answer.

A reply in denial of these paragraphs was filed, and the cause tried, but the evidence in the cause is not before us.

It is claimed by counsel for the appellee, that, although error was committed in the ruling upon either of the demurrers, still it was a harmless error, for which the judgment ought not to be reversed, because the subject matter of either or both paragraphs of the answer could have been given in evidence under the general denial which was filed.

In an action to recover real estate, all matters of defense can be given in evidence under the general denial; and in such case, if good special answers are held bad, the error may be harmless, because the defendant can offer the matter pleaded, under the general denial, and avail himself of any question of law arising thereon by instructions, or otherwise. But where bad special answers are held good, it is not perceived that the plaintiff is in any way benefitted by the general denial being in. He has no mode of availing himself of the objections to the answer but by demurrer, and that being overruled, if the answer is true in point of fact, his case is at an end.

If the evidence were in the record, and it appeared that the proof sustained the second paragraph of the answer or other defense, and did not apply to the third paragraph, we might be enabled to say that the plaintiff was not injured by the overruling of the demurrer to the third paragraph.

But as the case stands before us, we cannot say that the verdict was not found upon the third paragraph, and therefore we cannot say that the error was harmless. The judg-

ment below will have to be reversed on account of the error in overruling the demurrer to the third paragraph of the answer.

The judgment is reversed, with costs, and the cause remanded, with instructions to the court below to proceed in the cause in accordance with this opinion.

J. McCabe, for appellant.

T. F. Davidson, for appellees.

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DRAPER *v.* FALLEY and Another.

AMENDMENT OF LAWS.—*Constitutional Law.*—Section 21 of article 4 of the constitution of this State requires that in revising an act or amending a section, the act or section shall be set forth and published at full length as revised or amended, but does not require that the old act or section shall be set forth and published; though, if this be done, it will not render the revision or amendment invalid, but the old act or section will be regarded as surplusage.

SAME.—*Court of Common Pleas.—Fifteenth District.—Times of Holding Court.*—The act of March 9th, 1861 (Acts 1861, p. 56), amending the fifteenth section of the act of March 5th, 1859 (Acts 1859, p. 84), and fixing the times of holding the court of common pleas in the counties of Benton, White, Carroll and Tippecanoe, is not in conflict with section 21 of article 4 of the Constitution, and, by implication, repealed said fifteenth section. The substitution in said act of 1861, of the word "while" instead of the words "as long as," in attempting to recite said fifteenth section, does not affect the validity of the act.

SAME.—*Act of May 31st, 1861.*—The act of May 31st, 1861 (Spec. Sess. p. 38), attempting to amend said fifteenth section of said act of 1859, is invalid as an amendatory act, because it attempted to amend a section which had no existence. Nor is it valid as an original act.

APPEAL from Carroll Common Pleas.

BUSKIRK, J.—The appellees commenced an action in the Common Pleas Court of Carroll county against the appellant, on a promissory note. The process was made returnable on the fourth Monday of May, 1869. The court met

on that day. On the second day of the term, appellant appeared and filed an answer in one paragraph, which was in these words:

"Comes now the defendant, and says that the court ought not to hear and determine this cause at this time, because he says this is not the time provided by law for the holding of this court, but says that the same should be begun and held on the second Monday in June, and not on the fourth Monday in May."

To this answer the appellees demurred. The demurrer was sustained, and an exception taken. The cause was, by the agreement of the parties, submitted to the court for trial. There was a finding for the appellees, motion for a new trial made, overruled, and excepted to. The only cause assigned for a new trial was the alleged error of the court in sustaining the demurrer to the answer. This ruling of the court is the only error assigned in this court. The only point submitted for our decision is, whether the Court of Common Pleas of Carroll county should commence on the fourth Monday of May, or on the second Monday of June, in each year. There is no controversy as to the proper times of holding the January and September terms of said court. The decision of the point presented by the record in this case involves an examination of the several acts of the legislature fixing the times for the holding of the common pleas court in Carroll county, and the conflicting decisions of this court as to the constitutional modes of making amendments to existing laws. The times for holding the common pleas courts were first fixed by an act approved March 4th, 1853. The court in the county of Carroll was, by that act, held on the first Mondays of January, April, July, and October. See Acts of 1853, p. 41.

In 1859, the act of March 4th, 1853, was repealed, and a new act was passed. By this act the common pleas district that had been numbered eleven in the act of March 4th, 1853, was numbered fifteen, and the times for holding the court in Carroll county were fixed on the fourth

Mondays of January, May, and September, in each year. Acts of 1859, p. 84. By this act the times for holding the court in Benton county were fixed on the first Mondays in January, May, and September. At the regular session of 1861, section fifteen of the act of March 5th, 1859, was amended, so far as it affected the times of holding the court in Benton county, but no change was made as to Carroll county. Acts of 1861, p. 56. In this act the legislature attempted to "set forth and publish at full length" the fifteenth section of the act of 1859, but it is not accurately copied. The words "as long as," in the last line, are omitted, and the word "while" is substituted. In every other respect the section is accurately copied, and is "set forth and published at full length." The section, as amended, is then "set forth and published at full length." An attempt was made to amend the act of March 5th, 1859, at the special session of 1861. The title of this act is as follows:

"An act to change the time of holding the Common Pleas Court, in the counties of Carroll and Tippecanoe, and to make all process returnable thereto."

The first section of said act is in these words:

"Sec. 1. Be it enacted by the General Assembly of the State of Indiana, that section fifteen of an act entitled 'an act to fix the times of holding the common pleas courts in the several counties of this State, the duration of the terms thereof, and making all process from the present common pleas courts returnable to such terms, and declaring when this act shall take effect, and repealing all laws inconsistent therewith,' approved March 5th, 1859, which reads as follows," &c. The fifteenth section of the act of March 5th, 1859, is then "set forth and published at full length," except that the word "and," preceding the words "in the county of Tippecanoe," is omitted.

The section as amended is then "set forth and published at full length," and is in these words:

"Sec. 15. In the county of Benton on the first Mondays of January, May and September; in the county of

White on the second Mondays of January, May, and September; in the county of Carroll on the fourth Mondays of January, the second Mondays of June, and the fourth Mondays of September; and in the county of Tippecanoe on the third Mondays of March, the first Mondays of July, and the third Mondays of December; said courts shall, if the business require it, sit in Benton one week, White two, Carroll three, at each term, and in Tippecanoe while the business shall require it."

There was no repealing clause to this act, or to the act of March 9th, 1861; but if the act of May 31st, 1861, is otherwise constitutional and valid, it repealed by implication the acts of March 9th, 1861, and of March 5th, 1859.

It is claimed by the appellant that the act of March 9th, 1861, is unconstitutional and void, for the reason that section fifteen of the act of March 5th, 1859, is not correctly and accurately copied and "set forth and published at full length," as required by the constitution of our State.

It is insisted by the appellees that the act of May 31st, 1861, is unconstitutional and void, for the reasons that the title to the act is defective, and that it attempts to amend a section that had been previously amended, and therefore was not in existence and could not be amended. In other words, it is insisted that the act of May 31st, 1861, should have set out the section as amended by the act of March 9th, 1861, and not the section as it was originally in the act of March 5th, 1859.

The decision of the questions presented will depend upon the interpretation and construction that should be placed on section 21 of article 4 of the constitution of the State of Indiana. This section provides, that "no act shall ever be revised or amended by mere reference to its title; but the act revised, or section amended, shall be set forth and published at full length."

This court, in the case of *Langdon* v. *Applegate*, 5 Ind. 327, placed a construction upon that section of the constitution. Hovey, J., in delivering the opinion of the court, says: "A

section so plain and clear would scarcely seem to need construction. The convention, aware of the loose and imperfect manner in which bills were hurried through the general assembly, thought proper to throw several guards around the legislation of the State. Bills had been passed without being read; laws repealed by reference to the word, line, section, or chapter; until the confusion that followed left the statutes so imperfect and ambiguous, that the most able jurists in the State were unable to ascertain their meaning.

"To remedy these evils, the 21st section, with others, was adopted; and we think its clear and apparent meaning is, that the act revised or section amended must be inserted at full length in the act amending or revising it, thus placing upon the same page the old law and the amendment.

"It has been contended, that the correct reading of this section is, 'no act shall ever be revised or amended by mere reference to its title; but the act *as* revised, or section *as* amended, shall be set forth and published at full length.' Upon this construction, the general assembly acted in the passage of the laws of 1853; but it is easy to be perceived that such a construction is at variance with the grammatical meaning of the section. 'No act shall ever be revised or amended by mere reference to its title.' It is scarcely necessary to say that the word 'act' alludes to a law previously enacted; 'but the act revised or section amended,' (What act, what section? The same act first referred to and intended to be revised or amended) 'shall be set forth and published at full length.'"

This decision was made at the November term, 1854, and was approved and followed by this court in many subsequent decisions. It was recognized as the true construction of such section by this court, until the November term, 1867, when our immediate predecessors in office, in the case of *The Greencastle, &c., Turnpike Co.* v. *The State, ex rel. Malot*, 28 Ind. 382, overruled it.

Gregory, J., in speaking for the court, says: "The read-

ing and the object of section 21, article 4, are plain. That section requires that every enactment of the legislature shall be complete within itself, that the present state of the law on any given subject may be learned by reading the last enactment, without the necessity of resorting to the old. This can be done without setting forth at length the old law, in every case where the new embraces all of the old left in force. The old law, and the mischiefs existing under it, ought not to be forgotten, in giving interpretation to such clauses. Let us mention them. Under the constitution of 1816, a section might have been amended by the passage of an act running thus: Be it enacted, &c., that section 26 of an act entitled 'an act regulating descents and the apportionment of estates,' approved May 14th, 1853, be and is hereby amended by inserting after the word 'within' the words 'neither brothers and sisters, nor their descendants.' The mischiefs of this practice were numerous, and in some respects grievous. It required much labor and pains on the part of legislators to enable them to understand such bills. Sometimes in the haste of the last hours of a session, this care being scarcely practicable, bills in this form were passed which never could have received legislative sanction if they had been understood; and in the administration of the law constant reference and comparison of statutes were necessary to render such acts intelligible. It was merely to prevent the mischiefs of this mode of legislation that the clause in question was inserted in the constition of 1851, and this is completely accomplished by requiring the amendatory act to set forth at full length the section as amended. To set it forth only as it was before amendment, would but partially remedy the evil; for then the law, as it would stand after amendment, need not be given, but might be left to be ascertained by examination and comparison. * * * A little consideration will render it obvious that this would be a very inadequate remedy for the mischiefs intended to be prohibited. Inasmuch as the language of the constitution can, without violence, and,

indeed, as we think, its plain meaning imports, be so interpreted that the mischiefs intended to be prevented may be wholly prevented, every principle of sound construction requires that it shall be. * * *

"In the question under consideration there is involved a rule of legislation as lasting as the constitution, and if we adhere to the previous rulings of this court, one of great practical inconvenience. Indeed, it would, under the rule heretore adopted, be almost impossible to revise the code, or any other act of great length. It has frequently, as in the case of the act for the incorporation of cities, driven the legislature, at great risk of the rights of parties, to repeal whole statutes and re-enact others, varying only in some few particulars from the old one."

Both the old and late judges of this court have agreed as to the purposes to be accomplished and the mischiefs to be remedied by the section in question, but they have differed radically as to the mode to be adopted to accomplish the purpose so much desired. Both sets of judges have been distinguished for their learning and ability, and they have each given very strong, cogent, and plausible reasons for their interpretation and construction of the section in question. STEWART, J., dissented from the opinion of the court in the case of *Langdon* v. *Applegate, supra.* The most distinguished and learned lawyers who were members of the convention that made the present constitution, while they agree as to the purpose of the section, disagree as to the manner in which the purposes and aims of the convention can be best accomplished. This court, in *Langdon* v. *Applegate, supra*, held that the only way in which this could be accomplished was to "set forth and publish at full length" the old act or section sought to be amended, and then to "set forth and publish at full length" the act or section after it had been amended. The effect of this ruling was to hold all acts unconstitutional and void unless the amendment was made in that manner. This court in the case of *The Greencastle, &c., Turnpike Co.* v. *The State, ex rel. Malot, supra*, held

that it was not necessary to "set forth and publish at full length" the act or section to be amended, but that the act or section as revised or amended was to be "set forth and published at full length." The court, in this case, did not decide that the mode prescribed in the former decision would vitiate the enactment. Under the former decision, an act or section can only be amended in one mode, while under the late decision, either mode would be valid.

It is impossible to reconcile these decisions. We must adopt the one or the other of these constructions; for the section in question is not susceptible of a third and different construction. We are greatly embarrassed by these conflicting and irreconcilable decisions. If it was an open and undetermined question, we would feel less hesitation in giving an interpretation and construction of this section. If the late decision had not been made, we would not probably feel inclined to disturb the former ruling. The consequences to result from overruling the late decision are sufficiently grave and momentous to induce us to act with great caution and deliberation. Before the late decision was made public, the legislature passed an act repealing all statutes not in conformity with the ruling in the case of *Langdon* v. *Applegate, supra*, and limiting the time in which actions should be brought arising out of the same, or for the violation thereof. The legislation of the State since the rendition of the late decision has been made in conformity therewith. The reversal of that decision would render all such legislation unconstitutional and void, and would compel us to reverse many decisions made by this court since the November term, 1867. This would produce great confusion, uncertainty, and embarrassment in every department of the public service. It would unsettle titles, reopen controversies now closed, increase litigation, and render uncertain what laws are in force. The mode prescribed by the late decision for the enactment of amendments to existing laws is more convenient, less liable to mistakes, and will save both time and money.

The plea of convenience, necessity, hardship, or consequences of any kind, should have no weight in placing an interpretation or construction upon a section of the constitution or act of the legislature, where great principles are involved, or where the language is plain and unambiguous; but where the rights and liberties of the citizens of the State are not involved, and where the instrument is susceptible of two constructions, then it is proper to weigh and consider the consequences, and to give that construction which will secure the aims intended, and which will result in the least injury or embarrassment to the public service. In this view we are sustained by very high authority. The Supreme Court of the United States, in the case of *United States* v. *Coombs*, 12 Pet. 72, says:

"And again, if the section admits of two interpretations, one of which brings it within, and the other presses it beyond the constitutional authority of Congress, it will become our duty to adopt the former construction; because a presumption never ought to be indulged, that Congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the court by language altogether unambiguous."

The same court, in the case of *Prigg* v. *Commonwealth of Penn.*, 16 Pet. 539, says:

"The safest rule of constitutional interpretation is, to look to the nature and object of the particular power, duties, and rights in question, with all the light and aid of cotemporary history, and to give to the words of each provision just such operation and force, consistent with their legitimate meaning, as will fairly secure and attain the end proposed."

In placing an interpretation and construction upon the section in question, we are required by the above decision to look to all the provisions in our constitution that were intended as guards and checks upon the loose system of legislation that existed prior to its adoption.

Sections 18 and 19 of article 4 of the constitution are in these words:

"Sec. 18. Every bill shall be read, by sections, on three several days, in each house; unless, in case of emergency, two-thirds of the house, where such bill may be depending, shall, by a vote of yeas and nays, deem it expedient to dispense with this rule; but the reading of a bill by sections, on its final passage, shall, in no case, be dispensed with; and the vote on the passage of every bill or joint resolution shall be taken by yeas and nays."

"Sec. 19. Every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act, which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

Sec. 22 of the same article prohibits the passage of local and special laws upon a large number of subjects therein enumerated. Section 23 reads as follows:

"Sec. 23. In all the cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State."

Section 22 of article 4 of the constitution of Oregon is the same as section 21 of article 4 of our constitution, and was copied from ours. The Supreme Court of that state, in *City of Portland* v. *Stock*, 2 Oregon, 69, held, that "the act revised or amended need not be set out in the revising or amendatory act," but that "the act revised or section amended must be set forth and published in full as revised or amended, incorporating all changes made." This decision is directly in point, and strongly sustains the recent decision of this court.

These provisions of our constitution remedy many of the evils complained of. After mature and thoughtful consideration, we have come to the conclusion that if the interpretation and construction placed upon the section in

question by our immediate predecessors in office, and the uniform interpretation and construction that has been placed upon the other sections of our constitution above quoted and referred to, are rigidly adhered to and carried out in good faith by the legislative department of the government, the aims and purposes intended by the framers of our constitution can be attained and secured, and our laws made plain, certain, intelligible, uniform, and stable. We therefore approve of the ruling of this court in the case of *The Greencastle, &c., Turnpike Co.* v. *The State, ex rel. Malot*, 28 Ind. 382.

It only remains for us to apply these principles to the acts of the 9th of March and the 31st of May, 1861, fixing the times of holding the court of common pleas in Carroll county. The act of March 9th, 1861, is constitutional and valid under the ruling in the case of *Langdon* v. *Applegate, supra*, as it, in substance, sets forth at full length the fifteenth section of the act of March 5th, 1859, and then sets forth and publishes at full length the section as amended. In our judgment, the omission of the words "as long as," and the substitution of the word "while," is so trifling and immaterial a change as not to affect its validity. This act is equally constitutional and valid under the late decision of this court. It complies with the constitutional provision by setting forth and publishing at full length the section as amended. The setting forth at full length the section sought to be amended will be, under the late decision of this court, regarded as surplusage, and will not effect its validity.

The act of May 31st, 1861, is unconstitutional and invalid under both decisions. It attempted to amend a section that had no existence. It is not, therefore, valid as an amendatory act. Nor can it be sustained as an independent original act. The first section of the act of March 5th, 1859, is in these words:

"Be it enacted by the General Assembly of the State of Indiana, That the courts of common pleas shall hold

their terms, in the several counties of this State, as set out out in the following sections in this act."

Then the act contains as many sections as there were common pleas districts. The language above quoted applies to and governs each section. When any of the sections of this act are amended, the amendment has relation back to the original act, and becomes a part of the original, so far that the words of the first section, declaring when the courts shall be held, apply to and govern the amended statute. The act of May 31st, 1861, not being an amendatory statute, it did not in any manner, or to any extent, become a part of the act of 1859. In no part of the act of May 31st, 1861, is there a declaration that the courts shall be held at the times therein specified. It is, for that reason, void as an independent statute. In our opinion, the act of March 9th, 1861, is valid, and the act of May 31st, 1861, is invalid. The Common Pleas Court of Carroll county was properly held on the fourth Monday of May. This conclusion renders it unnecessary to express any opinion as to the sufficiency of the title of the act of May 31st, 1861.

Judgment affirmed, with costs.

S. B. Sims, for appellant.

J. H. Gould and *R. H. Milroy*, for appellees.

The Bellefontaine Railway Company *v.* Reed.

Assignment of Error.—*New Trial.*—All the causes specified in a motion for a new trial are presented to the Supreme Court by an assignment that the court below erred in overruling the motion for a new trial.

Railroad.—*Injury to Animals.*—*Pleading.*—A complaint before a justice of the peace against a railroad company, for killing stock, alleged "that the defendant, on or about," &c., "at and in said county of," &c., "and State of Indiana, by its locomotive and train of cars then running on its railroad, at a point on its said road in said county where its railroad track was

not securely fenced, ran over and killed two hogs of the plaintiff of the value of fifty dollars; wherefore," &c.

Held, that the complaint stated sufficient facts.

SAME.—*Fences.*—A railroad company is liable for animals killed or injured by its train at a point where its road was not securely fenced, although the owner of such animals permitted them to run at large with knowledge of such defective condition of the fence, unless it was unlawful or impracticable to fence at such point; and the fact that the railroad company owned the land, and was using it as a place in which to deposit wood, to be removed as the exigencies of the company might require, does not relieve the company from such liability.

APPEAL from the Randolph Circuit Court.

DOWNEY, J.—This action was brought before a justice of the peace for the value of two hogs of the appellee, alleged to have been killed by a train of cars on the road of the appellant. There was a default by the defendant before the justice of the peace, and judgment for the plaintiff, after an assessment of the damages. The company appealed to the circuit court, when there was a trial by jury; finding for the plaintiff; motion for new trial by the defendant, which was overruled; motion in arrest of judgment, which was also overruled; and judgment rendered on the verdict. The evidence is made part of the record by a bill of exceptions.

The errors assigned are, that the court erred:

First. In overruling the motion for a new trial.

Second. In overruling the motion in arrest of judgment.

Third. In giving certain charges to the jury.

Fourth. In refusing instructions asked by the defendant.

Fifth. In refusing instructions as asked, and modifying the same.

Sixth. The verdict of the jury is not sustained by sufficient evidence.

Seventh. The verdict of the jury is contrary to law.

Eighth. The damages are excessive, as found by the verdict.

It may be remarked before proceeding to examine the questions on their merits, that the third, fourth, fifth, sixth, seventh, and eighth assignments of error are all embraced

in the first. They are each of them a ground for granting a new trial, and are properly assigned as reasons for granting the same; but are not necessarily, nor, perhaps, properly, specified as assignments of error.

The new trial was asked for the reasons:

First. That the verdict was not sustained by sufficient evidence.

Second. The verdict is contrary to law.

Third. The damages are excessive.

Fourth. The court erred in giving instructions one, two, three, and four by the court.

Fifth. The court erred in refusing to give instructions two and three asked by the defendant.

The motion in arrest of judgment was based on the alleged insufficiency of the complaint, and as that goes back to the foundation of the suit, we will examine it first. The complaint alleges, that the defendant, on or about the 13th of July, 1867, at and in said county of Randolph and State of Indiana, by its locomotive and train of cars, then running on its railroad, at a point on its said road in said county where its railroad track was not securely fenced, ran over and killed two hogs of the plaintiff, of the value of fifty dollars; wherefore, &c.

No specific objection to the complaint is pointed out by counsel for the appellant, and we do not observe any.

The evidence discloses the following state of facts: That the hogs belonged to the plaintiff, and were killed by a train of cars on the defendant's road where it passes over lands owned by the defendant. The tract of land was not inclosed, but there was a fence along the line of the railroad. It was in some places six rails high, and in others four and two rails in hight. At some places it had been thrown down, and openings made through it in this way. In other places it had been removed entirely, and its place supplied with ranks of wood; and then the wood had been taken away in some places, and in others it had been burned away, leaving openings of from two to five rods,

some of which had been open for a year, and others had been made more recently. The wood had been taken away by the employees of the company. The plaintiff lived a half mile from the place where the hogs were killed, knew of the openings in the fence, and allowed his hogs to run at large. The hogs could go on the tract of land of the defendant, and thence through the openings in the fence, and go upon the track of the railroad. They were killed on the railroad at a point opposite to the openings in the fence. One of them would weigh four hundred pounds, and was worth six cents a pound. The other would weigh three hundred and twenty-five pounds, and, on account of her being of better stock, was worth eight cents a pound.

With reference to this evidence, it is insisted by the appellant that the plaintiff was guilty of negligence in allowing his hogs to run at large when he knew of the condition of the fence, and that, for this reason, the finding should have been for the defendant. We think this position cannot be maintained. See *The Indianapolis, &c., Railroad* v. *McKinney*, 24 Ind. 283. Again, it is urged, that as the railroad company owned the land, and was using it as a place to deposit wood, and from which to remove it as the exigencies of the company might require, the company was not bound to keep it securely fenced.

We think this ground cannot be maintained. The statute makes the company liable for stock killed when the road is not fenced. Some exceptions have been allowed in cases where it was unlawful or impracticable to fence. But, very clearly, it is not shown that it was impracticable or illegal for the company to make and maintain a fence in this instance. The facts that the company owned the land, and were using it for the purposes named, were no sufficient reasons why they should leave the way open for animals to go across their land and upon the railroad. If there was anything in the nature of the use which the company was making of the land which made it impracticable to keep up the fence, it is not shown.

The instructions of the court to the jury were in accordance with our views of the law; and the same is true of the modification of the second charge asked by the defendant, of which complaint is made.

The judgment is affirmed, with ten per cent. damages and costs.

J. A. Harrison, for appellant.

T. M. Browne, for appellee.

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Curren and Another *v.* Driver.

Widow.—*Rights in Deceased Husband's Lands.—Mortgage.—Subsequently-Acquired Title.*—A husband and wife executed a mortgage without warranty on certain real estate to which neither had any title at the time, but afterwards the husband acquired title thereto in fee simple. Subsequently the mortgage was foreclosed on default, neither of the mortgagors appearing to the suit, and the land was sold under the decree to one not a party. Afterwards the husband died, leaving his said wife surviving.

Held, that the widow was entitled as such to one-third of said real estate.

APPEAL from the Ripley Common Pleas.

Pettit, C. J.—In February, 1854, the appellee and her husband mortgaged a piece of land to the State for the use of a congressional township, at which time neither had any title to it. In May, 1856, the husband of the appellee acquired a title in fee simple to the land. In 1858, the mortgage was foreclosed on default, neither of the defendants appearing to the suit. The land was sold on the decree to one Wyatt, who conveyed it to the appellant. In 1864, appellee's husband died, leaving her his widow. In 1868, this suit was brought by the appellee for partition of the land, claiming one-third of it as such widow.

The question before us is, can the appellee maintain a suit for one-third of the land, or is she estopped by the facts

above shown? We shall not attempt to discuss the whole doctrine of estoppel, but will endeavor to point out the law in the case before us.

If a grantor makes a quitclaim deed, and subsequently acquires a better title than the one he had, he can maintain his new title against his former quitclaim, but if he makes a warranty deed when he has no title, or a defective one, and after acquires a better or perfect one, it enures to his grantee.

The legislature has given an authoritative form, and declared its effect, which is, that if the mortgagor uses the words "mortgages and warrants," it shall be held to be a mortgage with warranty of perfect title, &c.; but if the words "and warrants," be omitted, the mortgage shall be good, but without warranty. 1 G. & H. 260. The mortgage in the record is without the words "and warrant," and was not, therefore, a warranty of title in the husband with covenants upon which he could have been sued for failure of title; and certainly no suit on the covenants of warranty could have been sustained against the wife, as she cannot be bound by any covenants in a deed. 1 G. & H. 258, sec. 6; Rawle Cov. Title, 3d ed., pp. 433, 434, note 2.

The husband might have set up the newly acquired title against this mortgage, though he would have been liable on the note secured by it; and the widow cannot be in a worse condition. Washb. Real Prop. b. 3, ch. 2, § 6, 43.

There was a foreclosure of the mortgage on default, and a sale of the property. This cannot bar the right of the wife; for she could not defend alone, she having no separate interest in the land. 2 G. & H. 42, sec. 9. Her interest was contingent on the death of her husband, which occurred six years after the foreclosure and sale.

The judgment is affirmed, at the costs of the appellants.

W. D. Wilson, for appellants.

H. W. Harrington and *M. K. Rosebrugh*, for appellee.

Robinson *v.* Murphy.

Evidence.—*Objection to.—Bill of Exceptions.*—An exception to the admission of evidence cannot be made available where it is not shown by a bill of exceptions what the ground of objection was.

Same.—*Covenant Against Incumbrances.—Breach of.—Taxes.*—On the trial of an action for breach of the covenant against incumbrances in a warranty deed, to recover an amount which the grantee has been compelled to pay as taxes constituting a prior incumbrance, there must be proper evidence of the listing and appraisement of the property, and of the action of the proper authorities in fixing the rate of taxation, where it is not fixed by law.

APPEAL from the Howard Circuit Court.

Downey, J.—This was an action by Murphy against Robinson for a breach of the covenant against incumbrances in a warranty deed. The alleged breach is, that at and prior to the date of the deed there were legal, valid, and subsisting liens against, and incumbrances upon, the real estate conveyed by the deed, the same then being subject to taxation, for state, county, township, and road purposes, including appropriation by the board of commissioners for the payment of bounties to volunteers for the United States army, and being also legally subject to taxation by the corporation of the city of Kokomo for the year 1865; that there was legally assessed and audited against said real estate for the year 1865, for state, county, road, township, and school purposes, including appropriation by the board of county commissioners for the payment of bounties to volunteers for the United States army, the sum of fifty dollars; and that there was also legally assessed and audited against said real estate a tax by the corporation of the city of Kokomo for the years 1864, and 1865, eight dollars, which amounts, with the interest, amounted, in March, 1868, to sixty dollars and forty cents; that the defendant had not paid said taxes; that the plaintiff was compelled to and did pay the same, to save the property from sale. A copy of the deed was made part of the complaint.

There was a demurrer to this complaint, which, we think,

was correctly overruled. This disposes of the first error assigned.

There were several paragraphs of the answer, but as all the matters which were well pleaded in the special paragraphs were admissible under the issue formed by the general denial, there is no question with reference to the answer which we need to consider. This disposes of the second alleged error.

At the trial, the court permitted the plaintiff to prove, by parol, "that at the June term, 1865, of the board of commissioners, there was assessed and levied a tax against Robinson and another on the real estate in question, for the year 1865, for county purposes, and school, road, township, and special school, for said year, and also one dollar and eighty-five cents on the hundred dollars worth of property as a bounty tax for said year 1865; and that at the time of payment of said taxes they amounted to fifty-five dollars and twenty-five cents."

The introduction of this evidence was objected to by Robinson, and we can easily imagine what might have been urged as an objection to it, but the bill of exceptions does not tell us what the objection was. If the objection was that the evidence was secondary, and it had been so stated to the court, the force of the objection might have been acknowledged, and the primary evidence produced. See 2 Davis' Ind. Digest, 485, sec. 108. The exception is not well taken.

The next alleged error is, that the court erred in overruling the motion of the defendant for a new trial. The fourth reason assigned for a new trial was, that the finding of the court was not sustained by sufficient evidence.

We think this position is well taken. There is a lack of evidence to show that the taxes were a valid and subsisting lien on the property, at the time of making the deed. There is no evidence of the listing and appraisement of the property, or, with the exception of the parol evidence above recited, any evidence of the action of the proper authori-

ties in fixing the amount or rate of taxation for county, township, road, and school purposes.

It is urged by the attorney for the appellee that the law gives a lien from the first day of January in each year for all taxes due from the owner, &c.

This is true; but how are we to measure the amount for which the lien is given? When the valuation of the property is shown, and the rate per cent. of the levy, the amount can then be determined. The rate of state tax is fixed by law, but we cannot from anything that is shown fix even the amount of that, for the value of the real estate is not shown.

The judgment is reversed, with costs, and the cause remanded.

J. W. Robinson, for appellant.

C. N. Pollard, for appellee.

Leobold *v.* The State.

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Obtaining Money by False Pretense.—*Character of Pretense.—Query*, whether a representation made by one that he is the owner of an extensive hat, cap, and fur establishment of the value of five thousand dollars, in a certain city in another state, is such a pretense as would induce a person of ordinary caution to loan the person making such representation the sum of ten dollars.

Same.—*Indictment.*—An indictment for obtaining money by false pretenses must allege to whom the money belonged.

APPEAL from the Wayne Criminal Circuit Court.

Worden, J.—This was an indictment against the appellant for obtaining money by means of false pretenses. Motion to quash overruled, and exception. Trial, conviction, and judgment over respective motions for a new trial, and in arrest.

The indictment, after the usual preliminary matter,

charges, "that Joseph Leobold, late of said county, at said county, on," &c., "did then and there unlawfully, feloniously, designedly, and with intent to defraud Franklin Newby, falsely pretend and represent to said Franklin Newby that he, the said Joseph Leobold, was then and at that time the owner of an extensive hat, cap, and fur establishment in the city of Dayton, in the State of Ohio, of great value, to wit, of the value of five thousand dollars, by means of which false pretenses and representations the said Joseph Leobold did then and there feloniously obtain from the said Franklin Newby the loan of ten dollars in money, with intent then and there feloniously to cheat and defraud him, the said Franklin Newby. Whereas, in truth and in fact, the said Joseph Leobold was not then and there the owner of a hat, cap, and fur establishment in said city of Dayton, contrary," &c.

In the case of *The State* v. *Magee*, 11 Ind. 154, it was held, that the pretenses must be of some existing fact, made for the purpose of inducing the prosecutor to part with his property, and to which a person of ordinary caution would give credit. In the case before us the pretense was, to be sure, of an existing fact, and may have been made for the purpose of inducing Newby to part with his money under the belief that the defendant was pecuniarily responsible; but some of the members of the court are inclined to the opinion that it was not such a pretense as to obtain credence from a person of ordinary caution, to the extent of inducing him to part with money or property. This point, however, need not be determined, as there is another objection to the indictment which is fatal. No ownership of the money obtained is alleged in the indictment. This is essential, as has been heretofore determined by this court. *The State* v. *Smith*, 8 Blackf. 489. That it was money obtained in this case, instead of other property, can make no difference, that we can perceive, in respect to the necessity of an allegation of ownership. The case of *Regina* v. *Norton*, 8 C. & P. 196, cited in *The State* v. *Smith*, *supra*, was a

case of the obtaining of money, in which it was held that an allegation of ownership was essential. The indictment was bad, and the motion to quash should have prevailed.

The judgment below is reversed, and the cause remanded, with instructions to the court below to quash the indictment; and the clerk of this court is directed to make the proper order for the return of the prisoner.

W. A. Peelle and *H. C. Fox*, for appellant.

B. W. Hanna, Attorney General, for the State.

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Weston *v.* Lumley.

Bill of Exceptions.—*Motion to Strike Out.*—Where a motion to strike out a paragraph of a pleading is overruled, the Supreme Court will not examine as to the correctness of the ruling, if an exception thereto be not saved by a bill of exceptions.

Slander.—*Pleading.*—*Code.*—Under our code, a defendant in an action for libel or slander may, in one paragraph of his answer, deny the allegations of the complaint, and in another paragraph plead in confession and avoidance.

Evidence.—*Record.*—*Certificate.*—A transcript of certain proceedings before a board of county commissioners was offered in evidence, the certificate of the auditor attached to which did not state that it was a full, true, and complete transcript of the record, but stated merely that it was "*truly copied* from the records," &c.

Held, that the certificate was defective, and that the transcript was not admissible in evidence.

Same.—*Slander.*—On the trial of an action for slander by A. against B., the complaint charging the defendant with having imputed perjury to the plaintiff by saying that in an affidavit made by the plaintiff, attached to and verifying a petition to the board of county commissioners to cause a certain road, alleged in said petition to have been in use twenty years, but not recorded, to be entered of record as a public highway, as provided by statute, Acts 1867, p. 133, the plaintiff had sworn to a lie;

Held, that said petition, it having been proved to be the original, and the affidavit attached thereto having been proved to have been made by the plaintiff, was admissible in evidence over the defendant's objection.

Weston *v.* Lumley.

SAME.—*Perjury.—Jurisdiction.—County Commissioners.*—Said petition to the board of commissioners did not allege that said road had been used *as a public highway* for twenty years. On the trial before the commissioners, A. testified as a witness, having been duly sworn by the county auditor. The commissioners found that the road had been used as a public highway for twenty years, and ordered it to be entered of record as a public highway as described in the petition.

Held, that notwithstanding the petition was defective and the proceeding irregular, yet the board of commissioners, though a court of inferior and limited jurisdiction, had, under said act of 1867 and the matters stated in the petition, such jurisdiction of the subject-matter as to make it legal perjury for A., as such witness, to testify falsely, knowingly, and corruptly.

Held, also, that on the trial of an action for slander by A. against B. for having imputed perjury to the plaintiff by saying that A., in his oral testimony on said trial before the commissioners, had sworn to a lie, the record of the proceedings in the commissioners' court was admissible in evidence over the objection of the defendant.

APPEAL from the Washington Circuit Court.

BUSKIRK, J.—This was an action commenced in the court below by the appellant, to recover damages of the appellee for slanderous words alleged to have been spoken by him of and concerning the appellant. There were issues of fact formed; trial by jury; verdict for the defendant; motion for a new trial made and overruled; and the plaintiff appeals. The complaint originally contained five paragraphs. The appellant dismissed the fourth and fifth paragraphs. The first paragraph of the complaint alleges, in substance, that there was pending at the September term, 1867, of the board of commissioners of Washington county a proceding to ascertain, describe, and enter of record a certain highway in said county, which, it was alleged, had been used as a public highway for twenty years; that upon the trial of the said proceeding, the appellant had been sworn, and testified as a witness; and that afterwards the appellee, in speaking of and concerning the said trial, and of the evidence given by the appellant, spoke the words charged, and thereby charged him with having committed wilful and corrupt perjury.

The second paragraph of the complaint contains the same allegations as the first, except it alleges that appellant

made an affidavit as to the truth of the matters contained in the petition which was filed in said proceeding, and the perjury imputed to the appellant was said to have been committed in the making of the said affidavit.

The third paragraph is, in substance, the same as the first.

The appellee filed an answer in three paragraphs. The first is a denial. The second admits the speaking of the words, and justifies upon the ground that the words spoken were true. The third paragraph admits the speaking of the words charged, but says that when the appellant made the statements under oath, he did not know them to be true, and had no reason to believe, and did not believe, that they were true; and that the defendant, upon a justifiable occasion, and without malice, spoke the words charged in the complaint.

The appellant filed a motion to strike out the second and third paragraphs of the answer. This motion was overruled, and excepted to; and this is the first error assigned. The clerk, in making out the transcript, has inserted the motion, the ruling of the court, and the exception thereto; but the correctness of the ruling of the court on this motion was not reserved by a bill of exceptions, and, for that reason, cannot be considered in this court. *Matlock* v. *Todd*, 19 Ind. 130; *Swinney* v. *Nave*, 22 Ind. 178; *Merritt* v. *Cobb*, 17 Ind. 314; *Hasselback* v. *Sinton*, 17 Ind. 545.

The appellant demurred separately to the second and third paragraphs of the answer. The court sustained the demurrer to the third, and overruled it as to the second. The appellant excepted to the ruling of the court in overruling the demurrer to the second paragraph of the answer. There was no exception taken as to the ruling of the court in sustaining the demurrer to the third paragraph of the answer.

The second error assigned is as to the ruling of the court in overruling the demurrer to the second paragraph of the answer. It is insisted by the appellant that, under our

code of practice, a defendant in an action for slander cannot in one paragraph of his answer deny the speaking of the words, and in another paragraph admit the speaking and justify them upon the ground that they were true. It is claimed that these answers are inconsistent with, and repugnant to, each other, and therefore bad. This is not the law, nor has it ever been the law in this State. In the case of *Wheeler* v. *Robb*, 1 Blackf. 330, which was an action for slander, this court say: "The statute authorizes the defendant to plead as many pleas as he thinks proper, and they must be considered independent of each other. The different issues in this case are entirely unconnected, and the admission contained in the plea of justification cannot, in any way, affect the plea of not guilty. Notwithstanding the special plea, the plaintiff in the court below was bound, upon the general issue, to prove his cause of action."

In the case of *Ricket* v. *Stanley*, 6 Blackf. 169, which was also an action for slander, this court say: "The third instruction is right. The plaintiff was obliged to prove his cause of action under the general issue, in the same manner as if no other plea had been filed. This point is so decided by this court in *Wheeler* v. *Robb*, 1 Blackf. 330, and in *Arnold* v. *Sturges*, November term, 1839."

The third clause of section 56, 2 G. & H. 88, provides:

"The defendant may set forth in his answer *as many grounds of defense*, counter-claim, and set-off, whether legal or equitable, as he shall have. Each shall be distinctly stated in a separate paragraph, and numbered, and clearly refer to the cause of action intended to be answered."

Sections 86 and 87, 2 G. & H. 110, provide:

"Sec. 86. In an action for libel or slander, it shall be sufficient to state generally that the defamatory matter was published or spoken of the plaintiff; and if the allegation be denied, the plaintiff must prove, on the trial, the facts showing that the defamatory matter was published or spoken of him."

"Sec. 87. In all actions mentioned in the last section, the

defendant may allege the truth of the matter charged as defamatory, and mitigating circumstances to reduce the damages, and give either or both in evidence."

These sections of our code clearly give to the defendant in an action for libel or slander the right in one paragraph to deny the allegations of the complaint, and in another to plead in confession and avoidance. But if the law were otherwise, the question could not be raised by demurrer. It can only be presented by a motion to strike out, or to require the party to elect upon which paragraph he will go to trial; and the ruling of the court and the exception of the party can only be made a part of the record by a bill of exceptions.

The appellant offered in evidence a certified copy of the proceedings had in the commissioners' court. This was objected to by the appellee, on the ground that it was not properly certified. The objection was sustained, and the evidence excluded; to which ruling of the court the appellant excepted, and assigns this as the next error of which he complains. The transcript is in the record by a bill of exceptions. The certificate is in these words:

"State of Indiana, }
Washington county, } ss.

"I, the undersigned, auditor of Washington county, do hereby certify that the foregoing is truly copied from the records of the board of commissioners of said county, at their September session, A. D. 1867, to wit, September 2d, A. D. 1867. In testimony whereof," &c. The residue of the certificate is properly signed and authenticated.

The certificate of the auditor was defective. It was not sufficient for him to certify that it was truly copied from the records. He should have certified that it was a "full, true, and complete transcript of the record." *Smith* v. *Jeffries*, 25 Ind. 376; *Tull* v. *David*, 27 Ind. 377. The ruling of the court below on this point was correct.

The appellant also offered in evidence the original peti-

tion that was filed in the commissioners' court. The appellee objected, and the objection was sustained, and the evidence excluded; and the appellant excepted, and assigns this as the next error. The second paragraph of the complaint alleges that the appellee had charged that the appellant in swearing to the truth of the matters contained in the petition, had "sworn to a God damned lie," &c. These words are not *per se* actionable, but are rendered so by proving that the appellant had made the affidavit in question. In this case, the appellant had proved that the paper he offered in evidence was the original petition, and that he had made the affidavit thereunto attached. Before the appellant, could make out his case, he was bound to prove the existence of the petition and affidavit as charged in the complaint; and having done that, he had the right to read to the jury the petition and affidavit. We think that the court erred in excluding this evidence.

The appellant also offered in evidence the original record of the proceedings in the commissioners' court. This record contained the petition, affidavit, and orders of the court made in reference thereto. The words charged in the first and third paragraphs of the complaint were not *per se* actionable. In the case of *Cummins* v. *Butler*, 3 Blackf. 190, this court say:

"As respects the second point, it may be remarked that when words are not actionable *per se*, but are rendered so by reference to some extrinsic matter, it is necessary not only to state that such matter existed, but that the words were spoken of and concerning it; and that in a charge importing perjury, four distinct allegations are necessary in a declaration,—1, the fact of an oath being taken in a competent court; 2, a *colloquium* by the defendant of and concerning such oath; 3, the words themselves; and 4, the *innuendo*, that the defendant meant by those words to impute perjury to the plaintiff. The words 'he has sworn false,' 'he has sworn to a lie,' are not *per se* actionable, and to become so, they must be connected with a judicial proceed-

ing." Before the appellant could recover, he had to prove the above allegations. The record itself was the best evidence. But it is urged by the appellee that the record of the board of commissioners was not admissible, for the reason that the court had not acquired jurisdiction of the subject-matter. The act of 1867, amending the 45th section of the act of 1852, is in these words:

"Sec. 45. All public highways which have been or may hereafter be used as such for twenty years or more, shall be deemed public highways, and the board of county commissioners shall have power to cause such of the roads used as highways as shall have been laid out but not sufficiently described, and such as have been used for twenty years but not recorded, to be ascertained, described, and entered of record." See Acts of 1867, p. 133.

The petition filed in the commissioners' court was in these words:

"To the Honorable, the Board of Commissioners of Washington county: The undersigned citizens of Monroe township would respectfully represent to your honorable body, that they wish to have a road, situated in Monroe township, and having been used for twenty years, entered of record. Said road is described as follows." The petition then properly describes the road which is sought to be entered of record, and is signed by William Weston. Weston made an affidavit as to the truth of the matters therein contained. The board of commissioners proceeded to hear and determine the matter, and found that the road described in the petition had been used as a public highway for twenty years, and ordered that it be entered of record as a public highway, as described in the petition. Weston, the appellant, testified as a witness, having been duly sworn by the auditor, who had full power and authority to administer the oath. The perjury imputed to the appellant was assigned upon the affidavit attached to the petition, and his oral testimony as a witness on the trial of the proceedings based on the said petition, and under the act of 1867 above quoted.

The attorneys of the appellee have insisted, with great earnestness, that the act of 1867 only conferred upon the board of commissioners the power to ascertain, describe, and enter of record roads in two cases. The first is, where the road which had been used as a public highway had been laid out, but not sufficiently described. The second is, where the road had not been laid out, but had been used as a public highway for twenty years, but had not been recorded. It is urged that the petition did not bring it within either of these classes, for the reason that it is not alleged that the road had been used as a public highway for twenty years; that the commissioners' court being one of inferior and limited jurisdiction, all the facts necessary to confer jurisdiction, should affirmatively appear upon the record; that the court having acted in the premises without having acquired jurisdiction, its proceedings were *coram non judice* and void; and that, consequently, the appellant could not have committed legal perjury, although he may have sworn falsely and committed moral perjury. The appellant insists that if the court possessed jurisdiction over the subject-matter, it possessed the power to hear and determine the matter, although the petition did not state facts enough to entitle the petitioners to the relief prayed for; that the court had acquired such jurisdiction as authorized it to hear proof; and that witnesses thus sworn and examined might commit legal perjury. The question is not free from doubt and difficulty. We have given it very careful attention and mature consideration. If the proceedings had taken place in a court of general jurisdiction, there would be no question as to its jurisdiction; but they were had in a court of inferior and limited jurisdiction. The proceedings were *ex parte* and, to some extent, in the nature of a proceeding *in rem*. If the proceeding to ascerain, describe, and enter of record the road in question were pending in this court on appeal, we would not hesitate to hold that the petition was defective and the proceeding irregular; but the real question which we have to decide is this,

whether the court had acquired, by virtue of the power conferred by the act of 1867 and the matters stated in the petition, such jurisdiction of the subject-matter as would make it legal perjury for a witness to swear falsely, knowingly, and corruptly.

This makes is necessary for us to determine whether the acts of the board of commissioners in the premises were within the scope of their authority, or otherwise. This court, in the case of *Snelson* v. *The State*, 16 Ind. 29, in speaking of the power of commissioners to make allowances against the county, say:

"Under these statutory provisions, it is clear enough that the allowances made to Snelson by the board were within the general scope of the authority conferred upon them. The board were, in terms, authorized to allow all accounts chargeable against the county. But it is argued that as the claim was not chargeable against the county, the allowance was not within the authority conferred. But whose province and duty was it to judge whether the accounts were chargeable against the county? Clearly, that of the board. If they decided that question wrongly, they committed an error of judgment, but did not usurp unconferred jurisdiction. If the account was properly chargeable against the county, it is clear that the action of the board would be conclusive, unless appealed from. Now the argument, that if the account were not chargeable against the county, the action of the board is a nullity for want of jurisdiction, proves too much. It proves that when the board decides correctly upon the liability of the county, the decision is conclusive; but when it errs in that respect, its decision is a nullity, and not merely erroneous; that the board had jurisdiction to decide right, but no jurisdiction to decide wrong. We suppose that where the board have jurisdiction to decide at all, the decision, whether right or wrong, cannot be regarded as void, but is binding unless appealed from or avoided in some legitimate mode."

Let us apply the principles of the above case to the one

under consideration. The commissioners' court possesses exclusive original jurisdiction over highways. The act of 1867 confers upon these tribunals the sole and exclusive power of ascertaining, describing, and entering of record highways, where they have been laid out but not properly described, and where they have been used as such for twenty years and have not been recorded. Their power over this subject is full, complete, and plenary. They have to exercise legal and judicial discretion. They possess the power to decide as to the sufficiency of the petition and the evidence. The Supreme Court of the United States, in the case of *The State of Rhode Island* v. *The State of Massachusetts*, 12 Pet. 657, say: "Any movement by a court is necessarily the exercise of jurisdiction; so, to exercise any judicial power over the subject-matter and the parties, the question is, whether, on the case before a court, their action is judicial or extra-judicial, with or without the authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction; what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action, by hearing and determining it."

The same court, in *The United States* v. *Arredondo*, 6 Pet. 691, say: "The power to hear and determine a cause is jurisdiction; it is '*coram judice*,' whenever a case is presented which brings this power into action." See *Ex Parte Watkins*, 3 Pet. 193; *Grignon's Lessee* v. *Astor*, 2 How. 319.

The case of *The State* v. *Hall*, 7 Blackf. 25, is in point, as it was an indictment for perjury, and the main defense was that the court in which the perjury was alleged to have been committed did not have jurisdiction of the case in which the defendant was sworn and examined as a witness. The court say: "The second reason given in support of the judgment of the circuit court is, that the cause in which the alleged perjury was committed was tried by a jury of six men; that a jury composed of six men, in such

a case, was wholly unauthorized by the law; and that the proceedings were, therefore, illegal and void. By the common law, false swearing, to amount to perjury, must be in a judicial proceeding, and in a court or before an officer having competent authority to administer an oath. Our statute is more comprehensive, and a false oath or statement of any nature, or for any purpose whatever, wilfully and corruptly taken before an officer authorized to administer oaths, is, by it, declared to be perjury. Where the false swearing was in the course of a judicial proceeding, we do not think it is essential to the commission of the offense of perjury, that all the proceedings on the trial should be strictly regular. It is essential, however, that the court have jurisdiction of the subject-matter, and power to administer an oath to the witness. If the proceedings were not so far irregular as to be a mistrial, the false swearing would amount to perjury."

The case of *Henry* v. *Hamilton*, 7 Blackf. 506, is directly in point, and is decisive of the question under consideration. This was an action for slander. The words charged imputed to the plaintiff perjury. The alleged perjury was said to have been committed in a trial of a state case before a justice of the peace. The plaintiff offered in evidence a transcript of the trial before the justice, and it was objected to on the ground that the justice did not have jurisdiction of the offense. DEWEY, J., in speaking for the court, says:

"The plaintiff in error contends, that the court erred in admitting in evidence the transcript of the record of the trial before the justice of the peace, on the ground that the transcript shows, as he alleges, that the justice had no jurisdiction of the cause which he tried, and, consequently, that perjury could not be committed in giving evidence on that trial. In support of this position, it is urged, in the first place, that the affidavit does not charge an offense cognizable by the justice, because it does not show for what purpose the assembly of the people, therein mentioned, assembled. If it be admitted that the affidavit is too

vague to require, or even to authorize, the justice to act upon it,—a question which we do not decide,—it does not follow, that after he did act upon it, and after the accused person appeared and answered to the charge without objection, the proceedings were *coram non judice* and void. The affidavit contains a charge, in general terms, that the accused person disturbed an assembly of people convened for a lawful purpose. This is an offense known to our law; and if those persons who were so charged chose to submit themselves to a trial, without objection to the validity of the complaint, the justice could rightfully hear evidence and examine the matter. The witnesses sworn by him were amenable to the law if they swore falsely; and it is proper that they should be protected from a charge of perjury if they testified truly."

We are clearly of the opinion that the court erred in excluding from the jury the record of the proceedings in the commissioners' court. For this error the court should have granted a new trial.

Judgment reversed, with costs, and the cause remanded, with directions to the court below to grant a new trial, and for further proceedings in accordance with this opinion.

H. Heffren and *S. D. Hendricks*, for appellant.

J. H. Stotsenburg and *T. M. Brown*, for appellee.

Cook *v.* Morea.

Trespassing Animals.—*Lawful Fence.*—Our statute defining a lawful fence and prohibiting a recovery of damages for cattle breaking into grounds not enclosed by such a fence (1 G. & H. 342) applies only to outside fences; as to inside divisions, parties are left to their common law rights and liabilities in respect to trespassing animals.

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SAME.—*Pleading.*—In an action commenced before a justice of the peace to recover damages for trespass by the defendant's cattle upon the plaintiff's cornfield, the complaint did not allege that the cornfield was enclosed by a lawful fence, or that the entry was made under other circumstances that would not preclude the right of action.

Held, that the complaint was not, for this reason, insufficient for a justice's court, or, it would seem, for the circuit court or court of common pleas.

SAME.—*Adjoining Proprietors.*—A person is not responsible for cattle, not under his charge or control, entering, from his pasture, where he keeps his cattle, upon adjoining land of another, and there doing injury, whether there be a partition fence or not.

APPEAL from the Hamilton Common Pleas.

WORDEN, J.—This was an action by the appellee against the appellant, brought before a justice of the peace, to recover damages for trespass by the defendant's cattle upon the plaintiff's cornfield.

Appeal by the defendant to the court of common pleas, where, upon trial, the plaintiff obtained a verdict and judgment.

In the common pleas, the defendant moved to dismiss the action because of the insufficiency of the complaint, but the motion was overruled. The objection urged to the complaint is, that it does not allege that the cornfield was enclosed by a lawful fence, or aver that the entry was made under other circumstances that would not preclude the right of action.

Our statute defining a lawful fence, and prohibiting a recovery of damages for cattle breaking into grounds not enclosed by such fence, 1 G. & H. 342, applies only to outside fences; and as to inside divisions, parties, in respect to trespassing animals, are left to their common law rights and liabilities. *Myers* v. *Dodd*, 9 Ind. 290; *Brady* v. *Ball*, 14 Ind. 317; *Crisman* v. *Masters*, 23 Ind. 319. Whether, in a suit commenced in the circuit or common pleas court any such allegation would be necessary, we need not determine; it would seem, however, to be unnecessary, inasmuch as circumstances which justify or excuse a trespass must be shown by the defendant. *Colden* v. *Eldred*, 15 Johns. 220.

The complaint was, at all events, abundantly sufficient for a justice's court, it being sufficiently certain to bar another action for the same cause, and containing a statement of a good cause of action.

The appellant claims that the court erred in permitting the plaintiff to give evidence of the value of his services in turning out cattle and putting up fences. There is a bill of exceptions containing all the evidence given in the cause, and there is no such evidence in it, nor does any bill of exceptions show that such evidence was given; hence this point is utterly without foundation.

The court gave to the jury the following charge, amongst others, viz.:

"If you believe from the evidence that an injury was done the corn of the plaintiff, by cattle breaking into the defendant's field, over a partition fence, out of a pasture where the defendant placed and kept his cattle, the defendant is liable for all damages resulting to the plaintiff's corn, whether the defendant was the owner of the cattle or not, and you should find for the plaintiff the amount of damages done his corn." We are inclined to think the word "defendant's" where it is first used in the above charge is a mistake for "plaintiff's," but the mistake may have been made in the transcription. The mistake, however, if there was one, we do not deem very material, as the general sense of the charge is about the same with the use of either word.

We understand the charge to mean, and think the jury must have understood from it, that if the defendant had a pasture where he placed and kept his cattle, separated from the plaintiff's cornfield by a partition fence, and cattle belonging to others, and not the cattle thus placed and kept in said pasture by the defendant, broke over the partition fence and entered the plaintiff's field, and did damage therein, the defendant was liable therefor. This construction of the charge—and we find ourselves, after mature consideration, unable to give it any other—renders it erroneous, as announcing a principle of law quite untenable.

We conceive it to be quite immaterial in whom might be the ultimate ownership of any cattle which the defendant was depasturing, and which broke from his pasture over a partition fence into the plaintiff's field. In such case, the defendant, whether he was the owner of the cattle or was depasturing them for some one else, would be liable for the damage done by them. *Barnum* v. *Vandusen*, 16 Conn. 200. But the charge assumes that the defendant was bound to keep his pasture so fenced as to prevent the cattle of other people from getting into it and from thence into the plaintiff's field; or, in other words, that he was bound to keep other people's cattle from entering the plaintiff's field from his pasture where he placed and kept his own cattle. This is not the law. To be sure, under the statute, a man must have a lawful outside fence, or he cannot recover damages for a breach of it by cattle, but he need not enclose his land at all, unless he chooses; and he is in no wise responsible for cattle, not under his charge or control, entering his land, and passing from that to land adjoining it, whether there be a partition fence or not. There was another charge given which was excepted to, but as we see no error in it, it is conceived not to be necessary to extend this opinion by setting it out. Several charges were asked by the defendant and refused. We think they were correctly refused, but no good purpose will be subserved by setting them out here.

The judgment will have to be reversed on account of the error in giving the charge above set out.

The judgment below is reversed, with costs, and the cause remanded for a new trial.

J. W. Evans and *A. F. Shirts*, for appellant.

G. H. Voss, for appellee.

HARDY *v.* DONELLAN.

INJUNCTION.—*Notice.*—*Waiver.*—Where the defendant in an application for a temporary injunction appeared by himself and attorney, and made no objection for want of notice;

Held, that any defect for want of notice was cured.

SAME.—*Evidence.*—A temporary injunction may be granted without any other evidence than the complaint and affidavit of the plaintiff.

PARTNERSHIP.—*Execution against one Partner.*—An execution against one of two partners constituting a firm, in favor of a third person, may be levied upon the interest of the execution-defendant in the partnership property, and such interest may be sold thereunder for his individual debt.

APPEAL from an order of the judge of the Madison Circuit Court in vacation, granting a temporary injunction against the appellant.

PETTIT, C. J.—It is objected that no notice of the application was given to appellant. The record and bill of exceptions show that he appeared by himself and attorney, and made no objection for want of such notice. This cured any defect for want of notice. It is claimed that the judge erred in granting the injunction without any other evidence than the complaint and the affidavit of the appellee, both of which were read to the judge on the hearing. There was no error in this, as the appellee was a competent witness in his own behalf, and might have given oral evidence or have used his affidavit at his option.

The complaint was filed against the appellant and three others, but only one appeals to this court; and the only remaining question for us to consider is, can one of two partners enjoin the levy of an execution in favor of a third person, against the other partner, and the sale of his interest in the partnership property for the latter's individual debt? We are referred to no law which forbids this to be done, and we hold there is none. *Shæffer* v. *Fithian*, 17 Ind. 463; *Dean* v. *Phillips*, 17 Ind. 406; Parsons on Partnership, 357, 358.

We do not say what the rights of the purchaser at such

sale would be. That may be a subject of future consideration.

The judgment and order of said judge, so far as it relates to the appellant, is reversed, at the costs of the appellee. Cause remanded for further proceedings not inconsistent with this opinion.

W. R. Pierse and *H. D. Thompson*, for appellant.

J. A. Harrison and *J. Smith*, for appellee.

The State, on the Relation of Billman, *v.* Hamilton.

Escape.—*Liability of Sheriff.*—*Bastardy.*—Where judgment is rendered against the defendant in a prosecution for bastardy, and he is committed to jail for failure to pay or replevy said judgment, and the sheriff permits him to escape without paying or replevying the same, the sheriff is liable for the full amount of said judgment, notwithstanding the insolvency of said defendant.

APPEAL from the Ripley Common Pleas.

Buskirk, J.—This was an action brought by the relatrix, Louisa Billman, against the appellee, as sheriff of Ripley county, for permitting an escape. The complaint was in two paragraphs. The substantial allegations in the complaint are, that the relatrix, on the — day of August, 1867, obtained a judgment, in the Ripley Circuit Court, against Stephen Volty, in a prosecution for bastardy, for the sum of four hundred dollars and the costs of the prosecution; that the court ordered that the defendant should pay or replevy the said judgment; that upon failure so to do, he should be committed to the jail of the said county; that he failed and refused to pay or stay such judgment, and was by the appellee, who was then the sheriff of the said

county, committed to the jail of the said county; that afterwards, and while in the said jail, the appellant negligently permitted him to escape; that the said judgment remained unreversed and unpaid, in whole or in part; and that she had been compelled, by her own labor, to support the said bastard child, which was then living, and she demanded a judgment against the appellee for the principal, interest, and costs of the said judgment.

The appellee answered in two paragraphs. The first was the general denial. The second was in these words: "And for a second and further answer to the first and second paragraphs of the complaint, by way of mitigation of damages, the defendant says, that at the time of the rendition of the said judgment for bastardy against the said Stephen Volty, the said Volty was, and ever since has been, notoriously insolvent, and had no means out of which the said judgment, or any part thereof, could have been made."

The appellant demurred to this answer, which was overruled and excepted to.

The appellant replied in two paragraphs. The first was in denial. The second charged, in substance, that the said Stephen Volty had friends who would have become replevin bail on the said judgment; that at the time of his escape he had actually made an arrangement with Peter Wagner, a citizen of said county, and who was responsible, to replevy the said judgment; that the said Wagner would have become replevin bail on the day after his escape, if he had not escaped; and that after such escape the said Wagner refused to replevy the same.

The appellee demurred to this paragraph of the reply, which demurrer was sustained, and the appellant excepted. The appellant then, by the leave of the court, withdrew the general denial, and refusing to further reply, the court found for the defendant for want of such reply. Judgment was then rendered for the appellee, and the appellant excepted.

The overruling of the demurrer to the second paragraph of the answer is assigned for error, and is the first question presented for our decision.

An escape is either voluntary or negligent; voluntary when the officer permits him to escape; negligent when the party escapes without the consent of the officer. "By the common law, debt only lies upon contracts. Escapes are considered torts, and are so treated by courts of justice. Hence, at common law, the remedy is an action on the case." *Gwinn* v. *Hubbard*, 3 Blackf. 14. The statutes of West. 2, ch. 11 (13 Ed. 1), and 1 Rich. 2, ch. 12, give the action of debt for escapes on the writ of *ca. sa.* These statutes read as follows: "If, after judgment, a sheriff permits a debtor to escape who is charged in execution for a certain sum, the debt immediately becomes his own, and he is compelled to satisfy the whole amount." These statutes are in force in this State. *Gwinn* v. *Hubbard*, *supra*; 1 G. & H. 415. In an action at common law for an escape, the defendant may plead, in mitigation of damages, the insolvency of the party who escapes, where the escape is not voluntary. *Richardson* v. *Spencer*, 6 Ohio 13; Daugherty on Sheriffs, 180.

Under the statute above quoted, the defendant is liable for the whole debt. He cannot, therefore, plead in mitigation of an action based on such statute, the insolvency of the party who has escaped. Besides, in this State, a person who is found to be the father of a bastard child, on failure to pay or replevy the judgment, is to be imprisoned in the jail of the county until he does comply with the order of the court. To permit a sheriff, when he is sued for permitting the escape of a person confined in jail for a failure to pay or replevy a judgment in bastardy, to plead the insolvency of the person that he had permitted to escape, would be to deprive the unfortunate mother of such a child of a substantial remedy, provided by the laws of this State for the enforcement of her judgment, and to encourage the repetition of such offenses against good morals, the peace and happiness of families, and the best interests of

society. We cannot give our sanction to any such doctrine. The court erred in overruling the demurrer to the second paragraph of the answer. For this error the cause must be reversed. The conclusion that we have reached renders it unnecessary for us to pass upon the sufficiency of the second paragraph of the reply.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to sustain the demurrer to the second paragraph of the answer, and for further proceedings according to this opinion.

W. D. Willson, for appellant.

R. M. Goodwin, *L. Howland*, and *W. D. Ward*, for appellee.

33 505
124 410

Mandlove *v.* Pavy.

33 505
171 112

County Commissioners.—*Appeal.*—On an appeal to the circuit court from the decision of the board of county commissioners in a proceeding to contest an election to the office of township trustee, the circuit court cannot remand the cause to said commissioners for trial and determination, but must finally determine it as an original action.

APPEAL from the Decatur Circuit Court.

Downey, J.—This was a proceeding instituted before the commissioners of Decatur county, by Pavy, contesting the election of Mandlove to the office of trustee of Clay township, in that county.

There was a motion made before the commissioners by Mandlove to set aside the service of notice on him, which was overruled. The case was tried by the commissioners, and judgment rendered against him. He appealed to the circuit court. In that court, he filed a motion to dismiss the cause. Thereupon Pavy filed his motion to return the

case to the commissioners' court, with an order that the board fix a time for the hearing of the cause, and that proper and legal notice be given to the defendant of the time and place of trial, and that they proceed to try the cause and determine the rights of the parties. The court, without having decided anything in the case, sustained this latter motion and ordered the cause certified to the commissioners, with the instructions which were asked.

The appellant took the proper exception to this disposal of the case, and appealed to this court.

We think the action of the circuit court was erroneous. Mandlove had appealed from the commissioners' court to the circuit court, and it was the duty of the latter court to decide upon the question of service, and if sufficient, then to hear and determine the cause. It is said by this court, in the case of *McPherson* v. *Leathers*, 29 Ind. 65, "in such an appeal, the circuit court must try the cause for itself, as an original cause, and it does not take jurisdiction as a court for the correction of errors. It must make a final determination, and it may then either execute its judgment, or send the cause down to the commissioners with directions to carry the same into effect. 1 G. & H. 253, secs. 36, 37."

The judgment is reversed, with costs, and the cause remanded for further proceedings.

J. Gavin, *J. D. Miller*, *C. Ewing*, and *J. K. Ewing*, for appellant.

W. Cumback, *S. A. Bonner*, *C. Shane*, and *W. A. Moore*, for appellee.

TOWN OF MARTINSVILLE *v.* FRIEZE.

33 507
152 108

TOWN.—*Prosecution for Violation of Ordinance.—Affidavit.*—In a prosecution for a violation of a town ordinance prohibiting the sale of intoxicating liquors within the town, except for certain specified purposes, without a license from the board of trustees of the town, the affidavit on which the prosecution was based did not state when the ordinance was passed, and did not aver that the sale charged was not made for either of the purposes so excepted.

Held, that if the ordinance were valid, yet, because of said omissions in the affidavit, the cause was properly dismissed on motion of the defendant, no offer having been made to amend the affidavit in these particulars.

AMENDMENT OF LAWS.—*Constitutional Law.*—Under section 21 of article 4 of the constitution of Indiana, a section of a statute cannot be amended without setting forth and publishing at full length the *whole* section as amended, however long it may be, or into however many clauses it may be divided.

SAME.—*Town.*—The act of March 11th, 1867 (Acts 1867, p. 220), "to amend the seventh clause of section 22" of the "act for the incorporation of towns," &c. (1 G. & H. 619), is not in conformity with section 21 of article 4 of the constitution.

TOWN.—*License to Sell Intoxicating Liquors.*—The board of trustees of an incorporated town have no authority to pass an ordinance prohibiting the sale of intoxicating liquors within the limits of the corporation without a license obtained for such purpose by the seller from such board.

APPEAL from the Morgan Circuit Court.

WORDEN, J.—The trustees of the town of Martinsville, in the county of Morgan, passed an ordinance prohibiting the sale of intoxicating liquors within the limits of the corporation, except for medicinal or sacramental purposes, without a license from the board of trustees for that purpose; which license was only to be obtained upon the payment into the treasury of the town of the sum of one hundred dollars, and the giving of a bond with surety, conditioned for the keeping of an orderly house and the payment of all fines and costs that might be assessed against the applicant for any violation of the ordinance.

The appellee, George Frieze, was prosecuted before a justice of the peace for a violation of this ordinance by selling three quarts of ale for the sum of ninety cents. The justice found the defendant guilty, and adjudged that

he pay a fine of one hundred dollars. Frieze appealed to the circuit court, where, on his motion, the cause was dismissed for the want of a sufficient cause of action.

The town appeals to this court, and seeks a reversal of the action of the court below. The affidavit on which the prosecution was based was probably defective for not stating when the ordinance was passed, and for not averring that the sale was not made for either of the purposes excepted in the ordinance; and, admitting that an amendment could have been made, no leave to amend was asked; hence the judgment of the court was right, even though the ordinance be deemed to be valid. But the appellant asks us to pass upon the validity of the ordinance, and we prefer to do this rather than rest our decision upon a mere defect in the affidavit.

The validity of the ordinance depends upon the power conferred upon the board of trustees of the town to pass it. There is nothing in the original act on the subject of the incorporation of towns, &c., (1 G. & H. 619) that confers such power. A municipal corporation can no more exercise powers not conferred upon it than can any other corporation. They are all the creatures of the law, and can exercise such powers, and such only, as are conferred upon them by the law.

It is claimed, however, that an amendment of the original act, passed in 1867 (3 Ind. Stat. 121), confers power to pass the ordinance in question. That amendment, after reciting the original twenty-second section in full, proceeds to amend the seventh clause thereof, and sets out the seventh clause only as amended, and not the whole section as amended; and the question arises whether this is in accordance with the requirements of the constitution. The original twenty-second section, as recited in this amendatory act, was divided into seven distinct and separate clauses, and numbered progressively from one to seven inclusive, and conferred upon the board of trustees different classes of powers. The amendment, after reciting the original

section, as before stated, proceeds, after stating that "whereas it is deemed expedient to amend the seventh clause of said section twenty-two," to enact "that the said seventh clause of section twenty-two of said act be amended to read as follows: Seventh," &c., setting out the seventh clause as amended.

The provision of the constitution on the subject of amending statutes, though it has been quite frequently quoted in the opinions of this court, may bear another repetition. It is as follows: "No act shall ever be revised or amended by mere reference to its title; but the act revised, or section amended, shall be set forth and published at full length." Art. 4, sec. 21.

This provision has given rise to some diversity of opinion in this court as to whether it is necessary to set out in the amending statute the old law as it stood before the amendment; or whether it is sufficient to set out and publish the act or section *as* amended. The later decisions of the court, however, settle the proposition that the constitution is complied with if the amended act or section is set forth and published *as* amended, without a recital of the act or section as it stood before the amendment. *Draper* v. *Fulley*, at the present term, *ante*, p. 465.

But can a section of a statute be amended without setting forth the *whole* section as amended? The constitutional provision above cited furnishes a conclusive answer to this question. That requires the "section" (where it is a section only that is amended) to be set forth *as* amended. The term "section" means nothing less than the whole section, however long it may be, or into however many clauses it may be divided. It has been the custom, in modern times, in England, and the United States, and probably all other countries where the science of legislation has made any considerable progress, to divide legislative enactments into sections; and this was undoubtedly had in view when the constitution was adopted. The framers of that instrument intended that upon the amendment of a statute, nothing

less than the whole section as amended should be set forth, having in view the custom of thus dividing statutes into sections. Were it to be held that because a section happened to be divided into different clauses, the requirements of the constitution might be dispensed with, and a *clause* substituted for a *section* in setting forth the amendment, the door would be opened to other evasions of the constitutional requirement.

We think that the amendment of the statute is void, for the reason above stated, and therefore that the board of trustees had no power to pass the ordinance in question.

The judgment is affirmed, with costs.

A. Ennis, for appellant.

W. R. Harrison and *W. S. Shirley*, for appellee.

THE TOWN OF MARTINSVILLE *v.* GILLIG.

APPEAL from the Morgan Circuit Court.

DOWNEY, J.—This case is similar in all respects to that of the same appellant against George Frieze at the present term, *ante*, p. 507, and for the reasons there given the judgment must be affirmed.

Judgment affirmed, with costs.

A. Ennis, for appellant.

W. R. Harrison and *W. S. Shirley*, for appellee.

HERETH and Another *v.* MEYER.

PROMISSORY NOTE.—*Patent Right.*—A promissory note executed in 1866, in this State, and made payable at a bank therein, contained the words, "this given for patent right."

Held, that these words did not affect the character of the instrument as a promissory note governed by the law merchant.

APPEAL from the Marion Common Pleas.

DOWNEY, J.—Suit on the following promissory note:

"$1,000.00. INDIANAPOLIS, Dec. 22d, 1866.

"Four months after date we, or either of us, promise to pay to the order of S. B. Hartman one thousand dollars; value received, without any relief whatever from valuation or appraisement laws. The drawers and indorsers severally waive presentment for payment, protest, and notice of protest, and non-payment of this note. Negotiable and payable at the First National Bank of Indianapolis.

"This given for patent right.

"JOHN C. HERETH,
"J. M. W. LANGSDALE."

It was indorsed for value before maturity, by the payee to the appellee.

The defense alleged is, that the note was given for a worthless patent right; was obtained by fraud; and that the indorsee had notice before he purchased the note.

Issues were made involving these questions. There was a trial by jury, who found generally for the plaintiff, and specially, among other things, that the plaintiff had no notice, when the note was purchased, that Hereth and Langsdale had any defense to the note.

A motion for a new trial was made, which was overruled, exception taken, and the evidence is properly in the record. There were no exceptions taken to the giving or refusing to give instructions. The only point properly reserved is the refusal of the court to grant a new trial.

On this point we have no doubt. It is insisted by the counsel for the appellants, that the words in the margin of

the note were sufficient, of themselves, to put the indorsee on inquiry; and that by making the proper efforts he might have ascertained that there was a valid defense against the note.

To this position the counsel for the appellee responds by denying that there is anything in the words calculated to put him on inquiry, and asserting that if there was anything, and he had made inquiry, he could not have made the discovery which it is alleged he might have made, since the evidence shows that the purchase of the note by the appellee took place on the 16th day of January, 1867, and the appellants did not themselves discover, according to one of the special findings of the jury, until some time in April following, that they had been defrauded.

It is not unlawful to deal in patent rights. A note given for such a right is not, for that reason, void. The law of this State regulating the sale of patent rights, whatever its effects may be, was not in force when the note in question was executed. In *Goddard* v. *Lyman*, 14 Pick. 268, the note was as follows:

"SOUTH HADLEY, June 23, 1826.

"For value received of Edmund Warren, James J. Cutler, and Alexander Fleming, I promise to pay them, or order, two hundred dollars and interest, in eighteen months from date. S. W. LYMAN.

"The above note was given for the patent right of E. Warren's threshing machine."

The note was indorsed: "Pay the within to E. Warren and H. A. Green, at their risk and cost. James J. Cutler, A. Flemming." "I order the contents of this note, so far as I am interested therein, to be paid to H. A. Green or order. E. Warren." "Pay to Jonas Goddard, at his risk and cost. H. A. Green."

These questions were reserved for decision by the court:

"1. Whether the note was so indorsed as to enable the plaintiff to recover in the action.

"2. Whether the case disclose such a want or failure

of consideration as would constitute a good defense in a suit by the promisees.

"3. Whether, under the circumstances, the defendant can legally make the same defense against the plaintiff, who claims as indorsee."

Having answered the first question in the affirmative, the court said with reference to the others: "As to the second question, we give no opinion, because supposing the defense as set up would be good in an action by the payee, we think it very clear that it cannot be maintained in an action by a *bona fide* indorsee. It has been argued by the defendant's counsel that the report of the judge discloses circumstances sufficient to justify an inference that the plaintiff had knowledge of some defect in the note; and the form of the indorsement is principally relied on to maintain this inference. It was indorsed to be at the "risk and cost" of the indorsees; but this may reasonably be supposed to have relation to the possible insolvency of the maker, and is equivalent to the common form of indorsement without recourse to the indorser. But this would not authorize a jury to infer that the plaintiff or any prior indorsee had any knowledge that the patent right for which the note was given was of no value, or that they had any reason to suspect that such was the fact; nor is there any circumstance in the case which can justify any such inference." See, also, *Cone* v. *Baldwin*, 12 Pick. 545.

This court knows judicially, from its own records, that numerous and great frauds are practiced upon the unwary in the sale of patent rights; and it is probable that this is another to be added to the number. But when a party purchasing such a right has executed his note, governed, as this one is, by the same law which governs inland bills of exchange, and when that note has passed, by indorsement, into the hands of a *bona fide* holder for value, new and important rights arise, which the law must protect. The indorsee, for value, and in good faith, has a stronger right to

protection than the party who has executed his note and sent it out into the business community in such shape that it may give rise to the new rights to which we have referred.

Mercantile paper, by legal inference, imports a consideration. But if this implication is strengthened by a statement on the face of the paper that there was a consideration, and in what the consideration consisted, can it be said that this shall impair or degrade the character of the security?

If it be stated in the note that it is given for a tract of land, a span of horses, or a "patent right," can it be said that such statement takes away from the instrument its negotiable character according to the law merchant, and opens up to the maker every defense which he might have had if the note had remained in the hands of the payee?

We are satisfied that such is not the law.

The judgment is affirmed, with two per cent. damages and costs.

J. E. McDonald, *A. L. Roache*, *E. M. McDonald*, *P. W. Bartholomew*, *A. G. Porter*, *B. Harrison*, *W. P. Fishback*, and *J. M. Butler*, for appellants.

J. Hanna and F. Knefler, for appellee.

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Hereth and Another *v.* Smith.

Pleading.—*Answer.*—*Party in Interest.*—In an action on a promissory note by an indorsee against the maker, an answer admitting the execution of the note and alleging that the plaintiff is not the real party in interest, that he has no interest whatever in the note, and that it belongs to a third person, but not stating facts authorizing such conclusions, is bad on demurrer.

APPEAL from the Marion Civil Circuit Court.

Worden, J.—This was an action by Mary Smith against the appellants upon a promissory note executed by the

latter to one S. B. Hartman and by him indorsed to the plaintiff. Issue, trial, verdict, and judgment for the plaintiff for the amount of the note and interest. The record does not contain the evidence, or the instructions given, or those refused. There is no question before us properly, except that arising upon the fourth paragraph of the answer, to which a demurrer was sustained and exception taken. That paragraph is as follows:

"And for a further answer herein, the said defendants Hereth and Langsdale say that they admit the execution of the note in the said complaint mentioned, but they say that the plaintiff ought not to have and maintain said action herein against them, because they say that said plaintiff is not the real plaintiff [party] in interest; that she has no interest whatever in said note, and that said note belongs to one ———. Wherefore defendants pray judgment for costs," &c.

All pleadings in bar of an action resolve themselves into two classes, viz.: those in denial, and those by way of confession and avoidance. The above paragraph can hardly be held good as a denial of the cause of action, for the reason that it does not controvert or deny any allegation of the complaint. It expressly admits the making of the note, and does not deny the indorsement thereof to the plaintiff, as alleged in the complaint. Regarded as an answer by way of confession and avoidance, it must be taken to admit expressly or impliedly the making of the note and the indorsement thereof to the plaintiff, as alleged in the complaint; and admitting those facts, the inquiry arises, what new facts are alleged in avoidance of the legal effect of the facts thus admitted? It alleges that the plaintiff is not the real party in interest, &c.

The legal qualities of the answer will not be changed, but may be illustrated, by putting it in this wise: The defendants admit the making of the note, and that it was duly indorsed to the plaintiff by the payee thereof, as alleged in the complaint; but still they say she does not own it, but, on

the contrary, it belongs to some one else, and she is not the real party in interest. But if the note was thus endorsed to the plaintiff, why does she not own it? why is she not the real party in interest? and how did it become the property of some one else? The pleading fails to answer any of these queries, or to state any facts from which the assumptions are drawn. No new facts whatever are stated that avoid the legal effect of the facts thus admitted. That such pleading is bad needs the citation of no authorities, but for convenience of reference we cite the following: *Garrison* v. *Clark*, 11 Ind. 369; *Elder* v. *Smith*, 16 Ind. 466; *Raymond* v. *Pritchard*, 24 Ind. 318; *Lewis* v. *Sheaman*, 28 Ind. 427.

The judgment below is affirmed, with two per cent. damages and costs.

J. E. McDonald, *A. L. Roache*, *E. M. McDonald*, *J. M. Butler*, *P. W. Bartholomew*, *A. G. Porter*, *B. Harrison*, and *W. P. Fishback*, for appellants.

F. Rand and *R. H. Hall*, for appellee.

Hereth and Another *v.* Love.

APPEAL from the Marion Civil Circuit Court.

Pettit, C. J.—This case is in all respects the same as *Hereth* v. *Smith*, decided at this term, *ante*, p. 514, and is affirmed on that and the authorities there cited, with two per cent. damages and costs.

J. E. McDonald, *A. L. Roache*, *E. M. McDonald*, *P. W. Bartholomew*, *A. G. Porter*, *B. Harrison*, *W. P. Fishback*, and *J. M. Butler*, for appellants.

F. Rand and *R. H. Hall*, for appellee.

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127	596
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151	282
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Baker, Governor, *v.* Kirk.

Office.—*Term.—Vacancy.—Prison Director.*—When a person is elected by the General Assembly to the office of director of the state prison, since the expiration of the terms for which the first directors were elected, he, if eligible, is entitled to the office for the period of four years from the date of his election, and until his successor is elected or appointed, and qualified; except that when he is elected by reason of a vacancy having occurred in said office, he is entitled to the office only for the unexpired portion of the term of four years in which such vacancy has occurred, and until his successor is elected or appointed, and qualified.

Same.—*Constitutional Law.*—Section 7 of the act of May 13th, 1852 (1 G. & H. 672), is not in conflict with the constitution, so far as offices created by the legislature are concerned; and it applies to and governs the filling of vacancies in such offices created after the passage of said act, as well as those then in existence.

APPEAL from the Marion Civil Circuit Court.

Buskirk, J.—The appellee commenced in the court below a proceeding by *mandamus* against the appellant, as the Governor of the State of Indiana, to compel him to issue to the appellee a commission, as a director of the Southern State Prison, for the term of four years from the 11th day of January, 1871.

Upon the filing of the petition, the appellee moved the court for an alternative writ of mandate, directed to Conrad Baker, Governor of the State of Indiana, requiring him to show cause why a peremptory writ of mandate should not be issued, directing and requiring him, as the Governor of the State of Indiana, to issue to the appellee a commission as director of the state prison located at Jeffersonville, Indiana, for the term of four years from the 11th day of January, 1871.

The court ordered the writ to be issued. Whereupon the appellant appeared in open court and waived the issuing and service of said alternative writ of mandate, and entered his appearance thereto; and thereupon, by the agreement of the parties, this cause was submitted to the court for trial and final judgment, upon an agreed statement of facts

which was then filed as a part of the record in this cause, which agreed statement of facts is as follows:

"JOHN KIRK *v.* CONRAD BAKER, Governor of Indiana.

"It is agreed that this cause may be submitted to the court for decision upon the following agreed state of facts:

"That on the 18th day of January, in the year 1867, M. V. Ghee was duly elected by the legislature to the office of director of the state prison south, for the term of four years; that he was duly commissioned and qualified to act as such, and did enter upon the discharge of the duties of the said office for the said term of four years, and continued in the discharge of the duties thereof until on or about the — day of ————, 186–, at which time he accepted and entered upon the duties of another office, the duties of which were inconsistent with the duties of said office of prison director, and thereupon and thereby the said office of prison director became vacant; that the said Ghee, by his said election, became entitled to hold the said office for the term of four years; that his right to hold the said office ceased in the manner aforesaid, and thereupon the legislature of the State of Indiana, to fill the office made vacant as aforesaid, on the 23d day of April, in the year 1869, elected Robert S. Heiskell thereto; that the journals of the House of Representatives show that Heiskell was 'elected director of the state prison south,' and the journals of the Senate show that he was, by the joint convention that elected him, declared elected 'for the term prescribed by law;' that said Heiskell was commissioned by the Governor on the — day of ————, 1869, for the term of four years, said commission being upon the election aforesaid.

"It is further agreed, that on the 11th day of January, 1871, the legislature, in proper form, as stated in the certificate attached to the complaint herein, proceeded to elect a successor to the said Robert S. Heiskell; and that the plaintiff received a majority of the votes, and was, by the convention of the two branches of the legislature, declared

elected director of the state prison south for the term of four years; and that the said plaintiff is in all respects eligible to the office.

"It is further agreed that if said Heiskell was, according to law, elected only to fill the term of said Ghee, then there was a vacancy to be filled by the present legislature, and the election of the said plaintiff is valid to the said office, and that he is entitled to his commission accordingly; but if the said Heiskell was elected and properly commissioned for the term of four years from the time of his election, there was no vacancy to which the plaintiff could be elected.

"It is further agreed, that this cause is to be presented to the court at once, and if the court finds there was a vacancy to be filled upon the foregoing statement of facts, a *mandamus* shall issue accordingly, and either party has the right to except and prepare the case for the Supreme Court.

"JOHN KIRK,
"CONRAD BAKER,
"Gov. of Indiana."

Upon the foregoing statement of facts, the circuit court rendered the following finding and judgment, namely: "Being sufficiently advised in the premises, the court finds upon the agreed statement of facts that the election of Heiskell was for the unexpired term for which Ghee was elected, to wit, for the remaining time unexpired of four years from the 18th day of January, 1867, and until his successor, Kirk, was elected and qualified, and not for the term of four years from the date of the election of Heiskell, to wit, the 23d day of April, 1869; and that Kirk is entitled to the office of director of the state prison south for a term of four years from and after the date of his election, to wit, for four years from January 11th, 1871, and to have and receive a commission accordingly issued by Conrad Baker, Governor of the State of Indiana.

"Whereupon it is ordered and adjudged by the court that a peremptory writ of mandate do issue, directed to the

said Conrad Baker, as Governor, as aforesaid, directing and requiring him to issue to said John Kirk a commission as director of the state prison south for the term of four years from the 11th day of January, 1871, and until his successor shall be elected and qualified."

Proper exceptions were taken by the appellant to the finding and judgment of the court below, and the case is brought to this court to settle what is claimed to be a doubtful question of construction of the statutes, and not to harass the appellee or prevent him from obtaining the office to which he has been elected, if he is lawfully entitled thereto. It is due to Governor Baker that we should say that it appears from the record in this case that he has acted with the utmost fairness, and has afforded every facility for an early submission and prompt decision of the questions involved.

The real question presented for our solution and decision is this: For what period of time, or term of office, was Robert S. Heiskell lawfully elected in April, 1869? If he was elected for the full term of four years, if such is the term fixed by law for every person elected by the General Assembly to the office of prison director, then the appellee's election was premature and void, and the judgment of the court below should be reversed. But if the law under which Mr. Heiskell was elected provides for an election by the General Assembly of a prison director to fill the unexpired term of his predecessor in office, or for any term other than four years after the first election, then the appellee was lawfully elected, and the judgment of the court below should be affirmed. Mr. Heiskell's term of office and the appellee's rights under his said election alike depend upon the construction of the law under which both Heiskell and the appellee claim to have been elected and the act of May 13th, 1852, entitled "an act touching vacancies in office, and filling the same by appointment." The law under and by virtue of which Mr. Heiskell and the appellee were elected is the act approved February 5th, 1857, entitled

"an act to provide for the government and discipline of the state prison, and to repeal 'an act to provide for the government and discipline of the state prison', approved March 3d, 1855, and all other laws or parts of laws, inconsistent herewith." 1 G. & H. 464. So far as the questions now under consideration—the election and terms of office of the prison directors—are concerned, this act of 1857 has remained unchanged since it became a law. The second section of this act provides for the election of the directors, their terms of office, and the manner of filling vacancies by appointment. That part of the second section of said act which is applicable to the case now under consideration reads as follows:

"Sec. 2. There shall be elected by the General Assembly of the State of Indiana, at the present session thereof, three directors of the state prison, one of whom shall hold his office for two years, and two of whom shall hold their offices four years from and after their election aforesaid, and until their respective successors shall be elected or appointed, and qualified. After the first election of directors as aforesaid, *as the term of office of any director shall expire*, his successor shall be elected in like manner for the term of four years, and until his successor shall be elected or appointed, and qualified. Whenever any vacancy shall occur in the office of director, by death, resignation, or otherwise, or by the failure of the General Assembly to elect as aforesaid, the governor shall appoint a person to fill such vacancy, to serve until the next meeting of the General Assembly."

It is very manifest that the term of office of a prison director, as fixed by the above law, after the expiration of the term of office of the persons first elected, is for the period of four years. It is equally plain that the object of the legislature in providing that one of the directors first elected under this law should serve for two years, and that two of them should serve for four years, was to prevent the directors from all going out of office at the same time. The

legislature seemed to consider that the best interest of the State and of the unfortunate persons confined in the prison required that there should be, at all times, after the expiration of the term of service of the first directors, one director who had had experience and was familiar with the workings of the prison and its financial condition; hence, it is provided that one of the three of those first elected should serve for only two years, and that when his successor was elected he should serve for the term of four years, thus extending his term two years beyond the terms of the two who had been first elected for four years. If no vacancy occurred in the office of director, except by expiration of the full term of service as fixed by this act, then it would never happen that all the directors would be elected at the same time, or that all would go out of office at the same time. The above section makes ample provision for filling any vacancy that may occur in the office of director when the legislature is not in session. In such a case, or when the legislature shall fail to elect, it is made the duty of the Governor to fill such vacancy by appointment, and the appointee shall hold his office until the meeting of the next General Assembly, when his right to discharge the duties of such office would terminate. In such case, there would be a vacancy in such office from the meeting of the General Assembly until such time as the legislature should fill such vacancy by an election, unless the appointee could hold until his successor was elected or appointed, about which we express no opinion, it not being necessary that we should in this case; and if the legislature should fail to elect, then the Governor could fill the vacancy by appointment, after the final adjournment of the legislature, and the person so appointed would hold his office until the next meeting of the General Assembly. This act does not in express terms provide that when a vacancy has occurred and has been filled by appointment, the General Assembly shall elect a director, but such was the evident intention of the legislature, and such has been the practice.

But it is conceded by both the appellant and appellee in this case, that it was the duty of the legislature to fill by an election any vacancy that may exist in the office of director; for if it was otherwise, Heiskell would have no right to the office, for he was elected to fill a vacancy that had been created by the acceptance by his immediate predecessor, Ghee, of another office, which vacated his office of director. It is broadly admitted, in the agreed statement of facts, in this case, that it was the duty of the General Assembly that was in session in 1869, to elect some person as a prison director, in the place of Mr. Ghee, and that Mr. Heiskell was in due form of law elected. The only question in dispute is, whether he has the right under such election to hold the office for a full term of four years, or whether he only holds it for the unexpired term for which Ghee had been elected. The section of the statute under consideration is silent upon that point. It has to be determined by the interpretation and construction of this and other acts of the legislature. The section under consideration provides, that "after the first election of directors as aforesaid, as the term of office of any director shall expire, his successor shall be elected in like manner for the term of four years, and until his successor shall be elected or appointed, and qualified." The argument made by the attorneys for the appellant renders it necessary for us to place an interpretation upon, and give a definition of, the phrase "term of office" as used in the above section. It is urged by the appellant that the phrase "term of office" does not mean the fixed period of time for which the office may be held as fixed by law, but the actual time that any director may hold the office. He says, "the term of office, as fixed by the statute, is four years; but the term of office of the individual director may be, and often has been, for other and different periods of time. The term of office of the individual director may expire, and often has expired, in other ways than by limitation. By his death, his resignation, his removal from office, or his acceptance of another office of trust and profit,

his term of office as prison director will expire, cease, and determine, to all intents and for all purposes, and when *his* term of office shall so expire, then *his* successor shall be elected by the General Assembly for the *term of four years.*"

The able and learned attorneys for the appellant have, in their brief, presented, argued, and insisted upon the correctness of the above construction with great earnestness, ingenuity, and ability; but we think such position is wholly untenable. The argument amounts to this: that the phrase "term of office," as used in the section under consideration, does not apply to the office, but to the incumbent of such office; that when Ghee vacated the said office of director by the acceptance of another office of trust and profit, his term of office as director expired; and that it was the duty of the General Assembly to elect his successor for the full term of four years. In our judgment, this reasoning is unsound. It would make the term of office to depend upon the pleasure or caprice of the incumbent, and not upon the will of the legislature as expressed, in plain and undoubted language, in the law. This construction would defeat the true intent and meaning of the legislature, which was to prevent an entire change of the board of directors of the prison. The construction contended for would be in violation of the well settled rule of interpretation and construction, that "words, if in common use, are to be taken in their natural, plain, obvious, and ordinary significations; but if technical words are used, they are to be taken in a technical sense, unless a contrary intention clearly appear in either case from the context."

The attorneys for the appellant, in their brief, admit that, "in ordinary parlance, the phrase 'term of office' means the fixed period of time for which the office may be held." If this be true, then the construction contended for can only be sustained upon the theory that the phrase was used in a technical, or legal sense. This phrase, in our State, has a constitutional, legal, and technical meaning, and the signification thus given to it utterly destroys the position con-

tended for. Let us apply this test. The phrase is used several times in the constitution of Indiana. Section 30 of article 4 reads as follows:

"Sec. 30. No senator or representative shall, during the *term* for which he may have been elected, be eligible to any office, the election to which is vested in the General Assembly; nor shall he be appointed to any civil office of profit, which shall have been created, or the emoluments of which shall have been increased, during such term; but this latter provision shall not be construed to apply to any office elective by the people."

Section 16 of article 7 reads as follows; "No person elected to any judicial office shall, during the *term* for which he shall have been elected, be eligible to any office of trust or profit under the State, other than a judicial office."

Section 3 of article 15 reads as follows: "Whenever it is provided in this constitution, or in any law which may be hereafter passed, that any officer, other than a member of the General Assembly, shall hold his office for any given *term*, the same shall be construed to mean, that such officer shall hold his office for such *term*, and until his successor shall have been elected and qualified."

If we apply the same construction to sections 30 and 16, above quoted, as is sought to be applied to the section under consideration, the result would be that the senator or representative in the case mentioned in section 30, and the judicial officer in the case mentioned in section 16, could remove the ineligibility therein declared by resigning his office, which would close and terminate his "term of office." This conclusion is irresistible, if the phrase "term of office" applies to the incumbent and not to the tenure of the office. Section 3 of article 15 of our constitution, above quoted, gives such a definition and signification of the word "term," when applied to an office, as to conclusively demonstrate the incorrectness and fallacy of the interpretation placed upon the phrase "term of office," as used in the section

under consideration. We find the phrase "term of office" used all through our statutes creating and prescribing the terms of officers. We also find it in all our statutes fixing the times of holding courts. The phrase "term of office" has been constantly used by this court as referring to the tenure of office, and not to the incumbent. If the phrase under consideration was used in a strictly technical or legal sense, as we have seen, it means the tenure of office, and not the time which the incumbent may choose to hold such office. The construction contended for cannot be sustained either by the technical or common meaning of the phrase. But we have said that the construction contended for by the appellant would defeat the true intent and meaning of the legislature. This court, in the case of *The State, ex rel. Benton*, v. *The Mayor, &c., of Laporte*, 28 Ind. 248, which was a proceeding by mandate to determine the right to an office, in speaking of how far the intention of the legislature should control the interpretation and construction of a law, say: "In the construction of statutes, 'it is the duty of courts to execute all laws according to their true intent and meaning; that intent, when collected from the whole and every part of a statute, must prevail, even over the literal import of terms, and control the strict letter of the law, when the latter would lead to possible injustice and contradictions.' Smith's Com. 662; *The Mayor, &c.*, v. *Weems*, 5 Ind. 547.

"The evident intent of the section cited is, that only one councilman, of the two from each ward, shall be elected every two years, for a term of four years. But if the provision that 'all such officers elected at any special election shall hold their offices until the next general election, on the first Tuesday in May,' is held to include councilmen, it must result, that from special elections to fill vacancies occurring in that office, the two councilmen from the same ward will often be elected at the same general election, for the full term of four years, and regularly thereafter at the same date, thus defeating the object of the

legislature, which was to avoid an entire change in the representation of any ward at any regular election."

This case is directly in point, and plainly indicates that it is the imperative duty of this court to give such construction to the act under consideration as will execute and carry into effect the true intent and meaning of the legislature. We therefore hold that the words "after the first election of directors as aforesaid, as the term of office of any director shall expire, his successor shall be elected in like manner for the term of four years, and until his successor shall be elected or appointed, and qualified," apply where the director has served out the full term of office as fixed by law, and that they have no application where the director has resigned or vacated the office before the expiration of his full term of office, and consequently that Robert S. Heiskell was not lawfully elected and entitled to serve as a director for the term of four years.

It remains for us to inquire for what length of time he was elected and is entitled to hold his said office.

Section two of article fifteen of our State constitution reads thus: "When the duration of any office is not provided for by this constitution, it may be declared by law; and if not so declared, such office shall be held during the pleasure of the authority making the appointment. But the General Assembly shall not create any office, the tenure of which shall be longer than four years."

This section confers upon the legislature the power to create offices not provided for in the constitution, and to fix the tenure of such offices. There is but one limitation upon the power, and that is, that no office shall be created the tenure of which shall be longer than four years. The power to create an office and fix its tenure carries with it the power to provide for the election of such officers and the filling of vacancies that may occur therein. The legislature of 1852, in conformity with this provision of the constitution, passed various acts in reference to the election of officers, and finally, on the 13th day of May, 1852, en-

acted a law, entitled "an act touching vacancies in office, and the filling the same by appointment." The seventh section of this act reads as follows: "Every person elected to fill any office in which a vacancy has occurred, shall hold such office for the unexpired term thereof." See 1 G. & H. 672, sec. 7. This act was in existence and in full force when the act providing for the election of prison directors was passed, and the legislature seems to have framed the law in view of the seventh section above quoted, for it does not specify the time for which a person shall be elected to fill a vacancy, but leaves it to the general law. This court, in the case of *The Governor* v. *Nelson*, 6 Ind. 496, held that the seventh section above quoted was unconstitutional and void, in so far as it might apply to the filling of a vacancy in an office expressly created, and the tenure of which was fixed, by the constitution, but by implication held that it was valid and constitutional so far as it affected offices created by the legislature.

But it has been earnestly insisted by the appellant that the said section cannot apply to and govern in electing an officer to fill a vacancy in an office that was created after the act in question had become a law. The act in question is expressly authorized by the constitution, and is not restricted to offices then in existence, but is general in its terms and will apply to and govern the filling of vacancies in offices that were then in existence and to such as might be afterwards created. But this is no longer an open question. This court, in the case of *The State, ex rel. Benton*, v. *The Mayor, &c., of Laporte*, 28 Ind. 248, in determining the tenure of an officer elected under and by virtue of the law passed in 1857, refered to and was governed by the section in question. The court say: "Considering the entire section, we do not think councilmen are included in the provision in regard to special elections, but that they come under the general rule, that 'every person elected to fill any office in which a vacancy has occurred, shall hold such office for the unexpired term thereof.' 1 G. & H. 672, sec. 7."

We are of the opinion that Robert S. Heiskell was elected to fill the vacancy in the office of director created by the vacation of such office by Ghee, and that he is only entitled to hold such office for the unexpired term, and that the appellee was duly elected for a full term; and is entitled to be commissioned as a director of the state prison south for the term of four years from the 11th day of January, 1871.

The finding of the court below was fully sustained by the agreed statement of facts, and the judgment is in accordance with the law.

Judgment affirmed.

G. V. Howk and *W. W. Tuley*, for appellant.

T. A. Hendricks, *O. B. Hord* and *A. W. Hendricks*, for appellee.

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Biddle *v.* Reed.

Landlord and Tenant.—*Repairs.*—*Custom.*—Where a lease contains no covenant on the part of the lessor to repair, he is not bound to do so; and if the lessee makes repairs, he cannot charge the lessor with the cost thereof. Nor can a custom in the locality in which the premises are situated, or in the State, contrary to this rule, be set up by the lessee.

Pleading.—*Set-off.*—*Account.*—An answer by way of set-off, based upon an account for work and labor, money paid out, and materials furnished, is bad on demurrer, if no account be filed therewith.

APPEAL from the Allen Circuit Court.

Downey, J.—This was an action for rent predicated upon a lease, in which there was no covenant on the part of the lessor to repair.

In the answer there was a general denial, and in addition five special paragraphs. To the special paragraphs demur-

rers were filed, and sustained by the court. The defendant then withdrew the general denial. The damages were assessed by the court, and final judgment was rendered for the plaintiff.

The second paragraph of the answer alleges that by the lease the appellee was bound to repair; that the building became out of repair; that the appellee refused to repair; that the appellant repaired by putting a roof on the building, costing him, and being worth to the appellee, one thousand dollars.

As there was no covenant in the lease by which the lessor undertook to repair, he was not bound to do so; nor could the lessee do it and charge him with the cost of it. 2 Platt on Leases, 183, 195; *The Wabash and Erie Canal* v. *Brett*, 25 Ind. 409; *Womack* v. *McQuarry*, 28 Ind. 103; *Kellenberger* v. *Foresman*, 13 Ind. 475.

The third paragraph alleges the existence, "from time whereof the memory of man runneth not to the contrary," of a custom, in the city of Fort Wayne, where the premises are situated, for lessors to repair, where there is no express covenant to do so in the lease, and on this ground seeks to charge the lessor with the repairs.

The sixth paragraph alleges the existence of a similar custom in the State of Indiana, and on that ground seeks to make the appellee liable.

With reference to the custom alleged to exist in the city of Fort Wayne, it may be said, as was remarked by this court in *Harper* v. *Pound*, 10 Ind. 32, "this would create a body of local laws far more intricate and embarrassing in judicial investigations than the local statutes with which the State was formerly inundated. The recognition of these local usages is, as a general rule, contrary to the public policy of the State. Our constitution and judicial decisions are hostile to local legislation and local customs. The policy of the State is to have all her localities a unit, the same law and the same rule of decision prevailing everywhere throughout the State. Perhaps it is not too much

to say that a good usage or custom in this State should, in addition to the common law requisities, be shown to prevail all over the State, regarded as a single locality."

And as to the customs alleged in both the third and sixth paragraphs, we think they cannot be allowed, for the reason that they are in contradiction of a well established rule of law, repeatedly recognized and applied by this court. In *Cox* v. *O'Riley*, 4 Ind. 368, this court say, "A usage in conflict with plain, well established rules of law is not admissible in evidence in any case, and must be disregarded."

The court did right in sustaining the demurrers to the third and sixth paragraphs.

The fifth paragraph is bad for the same reason for which we held the second bad. It assumes that by the terms of the lease the lessor was bound to repair, which is not shown by the instrument itself.

The fourth paragraph is an ordinary paragraph of set-off based upon an account for work and labor, money paid out, and materials furnished; but no account was filed; and for that reason the demurrer was correctly sustained to it. 2 G. & H. 104, sec. 78.

The judgment is affirmed, with ten per cent. damages and costs.

L. M. Ninde, for appellant.

Adams *v.* Waggoner.

Assault and Battery.—*Damages.*—*Agreement to Fight.*—It is not a bar to an action for damages for an assault and battery, that the plaintiff and defendant fought with each other by agreement or mutual consent, and the injury complained of was inflicted in sudden heat arising in such fight without previous malice; but such agreement or consent may be shown in mitigation of damages.

APPEAL from the Johnson Common Pleas.

PETTIT, C. J.—The appellee sued the appellant for an assault and battery. The evidence shows that the battery was very severe—three wounds being inflicted by a knife.

The third paragraph of the answer was, that the injury happened in a fight by mutual agreement of the parties.

The fourth paragraph was the same in substance as the third, only changing the word "agreement" to "consent," and that the injury was the result of sudden heat, which arose during such fighting, and not from previous malice.

A separate demurrer was filed to each of these answers. The demurrers were sustained, and the appellant excepted. These rulings are assigned for error, but we need not notice them, as their consideration is waived in the appellant's brief. There was a trial had; verdict and judgment for the appellee; motion for a new trial overruled, and exceptions. The real question involved and presented for our consideration is raised by the giving of the third instruction asked by the appellee, and the refusal to give the first instruction asked by the appellant. The third instruction asked by the appellee, and given by the court, and excepted to by appellant, was this: "If you find, from the evidence, that plaintiff and defendant fought by agreement or by mutual consent, such agreement is no bar to the plaintiff's recovery of damages, but may be considered in mitigation of damages; but notwithstanding such agreement or consent, you should allow the plaintiff such damages as, under the circumstances, you may find he has sustained by the act of the defendant."

The first instruction asked by the appellant, refused by the court, and excepted to by appellant, was this: "If you find that the plaintiff and defendant fought with each other by mutual agreement, and that while so fighting, the defendant, in the heat of the conflict and without any wilful or premeditated malice, inflicted upon the plaintiff the injuries of which he complains, then you should find for the defendant."

Is an agreement to fight and the fact that the injury com-

plained of was inflicted in the heat of passion during such fight, without previous malice, a good defense to an action for an assault and battery? There certainly is no agreement proved by the evidence in this case, all of which is in the record, that one was to fight with, and the other without, a knife; but we do not find it necessary to examine the evidence further than to see and say that it was sufficient to base such instructions on.

It is a settled doctrine of the law, that if one be attacked he may defend himself, using no more force than may be necessary to repel the attack; but should he go beyond this, and use more force than necessary, he becomes a trespasser himself, and his assailant, though first in the wrong, may maintain against him an action for damages. *Fisher* v. *Bridges*, 4 Blackf. 518; *Philbrick* v. *Foster*, 4 Ind. 442; *Dole* v. *Erskine*, 35 N. H. 503. In the last case cited, which was an action to recover damages for an injury done in an affray, the court say, "A recovery may be had in cross actions for the same affray, by the party assailed for the assault and battery first committed on him, and by the assailant for the excess of force beyond what was necessary."

If the appellant had been entirely without fault when the appellee attacked him, but in defending himself had used an excess of force, a suit for damages could have been maintained by the appellee for the excess, although he was the first in the wrong; and can it be said or held that, as to his right to recover damages for the cutting he received, he is placed in a worse situation by an agreement to fight than he would have been upon an unprovoked assault upon an innocent man? In 2 Greenl. on Ev., § 85, it is said, "that if the injury was done in a fight, though by consent, it is an unjustifiable battery; the proof of consent being admissible only in mitigation of damages." In *Boulter* and *Clark*, cited in Buller's Nisi Prius, p. 16, PARKER, C. B., said, "the fighting being unlawful, the consent of the plaintiff to fight, if proved, would be no bar to his action; and that he was entitled to a verdict for the injury done him." In

Mathew v. *Ollerton*, Comb. 218, it is held, "that if a man license another to beat him, such license is void, because it is against the peace." In *Stout* v. *Wren*, 1 Hawks, 420, it was held, "that a man shall not recover recompense for an injury received by his own consent, provided the act from which the injury be received be lawful; but when two fight by consent, and one is beaten, he may recover damages for the injury, because the fighting is illegal." In the case of *Bell* v. *Hansley*, 3 Jones N. C. 131, the court held, "that one may recover in an action for an assault and battery, although he agreed to fight, for such agreement to break the peace is void." The same doctrine is held in *Logan* v. *Austin*, 1 Stew. 476, and in *Dole* v. *Erskine*, 35 N. H. 503.

We have cited enough from secular, or human laws to settle this question; but we will add one more authority, to show that this doctrine is not modern and secular, or human only, but that it is ancient and divine. In Exodus, xxi., 18, 19, it is written: "And if men strive together, and one smite another with a stone, or with his fist" (we insert, or cut him with a knife), "and he die not, but keepeth his bed; if he rise again, and walk about upon his staff, then shall he that smote him be quit: only he shall pay for the loss of his time, and shall cause him to be thoroughly healed."

We have bestowed no limited amount of consideration on the question presented, and we think the deduction and conclusion to which we have come, are fully warranted by the law and the reason thereof; which is, that an agreement, leave, or license, to do an act which in itself is unlawful, forbidden by positive law, and for the doing of which a penalty is attached and denounced, whether a felony or a misdemeanor, is no defense to an action for damages by a party who has been injured by the doing of such act, though he made the agreement, gave the license, leave, and consent; but when the wrong complained of is not forbidden by law, though it may be by morals, such as the seduction or debauching of a man's wife or daughter, slander, libel, or trespass on his real estate or to his personal

property, agreement, consent, or license, is a good defense.

The judgment is affirmed, with ten per cent. damages and costs.

S. P. Oyler and *D. W. Howe*, for appellant.

G. M. Overstreet and *A. B. Hunter*, for appellee.

Miller *v.* The Toledo, Wabash, and Western Railway Company.

Change of Venue.—*From County.*—Where a change of venue is granted in a civil action in the circuit court or court of common pleas because of an objection to the county, under sections 207, 208, and 209 of the code, the cause may be sent on such change to a county in another judicial circuit or district.

APPEAL from the Fountain Common Pleas.

Worden, J.—This was an action by the appellant against the appellee, brought in the Warren Court of Common Pleas, and, on the application of the defendant below, for cause addressed to the county, the venue was changed to the Court of Common Pleas of the county of Tippecanoe. Afterwards, on the application of the plaintiff, stating that he could not have a fair trial in said latter county, the venue was again changed to the Court of Common Pleas of Fountain county. The defendant below objected to the last change, because there had been a change from Warren to Tippecanoe, the only two counties in the district, urging that the cause could not be sent back to Warren, nor sent out of the district; but the objection was overruled, the change was ordered as above stated, and the defendant excepted.

In the Fountain court, the defendant moved, amongst other things, that the cause be dismissed for want of jurisdiction in that court, upon the ground, in substance, that a

cause could not be sent out of the judicial district on a change of venue. The motion thus made was sustained by the court, and the cause was dismissed, to which ruling the plaintiff duly excepted. To reverse the judgment thus dismissing the cause, the case comes to this court, and the only question presented is, whether the cause could have been properly sent from Tippecanoe to Fountain county, they being in different judicial districts.

It has been a somewhat mooted question whether a circuit or common pleas court could, on change of venue from the county, send the cause out of the circuit or district.

The earliest legislation on the subject, to which our attention has been called, perhaps the first in the State, is in the Revised Laws of 1824. It is provided in the sixth section of the act, that "no change of venue shall be granted so as to take the case out of the circuit where the suit is commenced, unless the president of the circuit be interested or prejudiced," &c. This provision was re-enacted and continued in the Revisions of 1831, and 1838, and, with slight change of phraseology, in the Revision of 1843. But in the Revised Code of 1852, though provision is made for a change, both on account of objections to the judge, and objections to the county, the prohibition to send the cause out of the circuit is omitted. 2 R. S. 1852, p. 74. Again, in the amendment of 1859 (Acts 1859, p. 139), there is no restriction in this respect, although this amendment provides, for the first time, it is believed, for calling another judge, where the objection is made to the judge, instead of sending the cause away to be tried. The statute of 1852, as amended in 1859, and again in 1861, constitutes the present law on the subject. 2 G. & H. 154. It provides for calling a different judge to try the cause, and not for a change of venue properly speaking, in four classes of cases, where the objections are made to the judge; and for a change of venue proper in three classes of cases, where the objections are not to the judge but to the county; and in the latter cases the cause is to be sent to another county

for trial, but there is no restriction whatever as to the county to which it shall be sent. If any argument is to be drawn from the fact that such restriction was contained in the statutes prior to the revision of 1852, and in that revision omitted, it is that the legislature intended to omit the restriction, and permit the judge or court granting the change to send the cause to any county he thought proper without reference to the division of the State into circuits or districts. Nor is there any good ground for holding that the old statutes are continued in force to supply an omitted case. There was a consideration that may have induced the legislature to omit the restriction. They may have anticipated just such cases as the present.

A little over a month before the passage of the act of 1852, they had provided for the organization of the court of common pleas; and they may have foreseen that at no distant day the increase of population and business of the State would be such that two counties, or even one, would be sufficient to constitute a judicial circuit or district; and in that event, unless a cause could be sent out of the circuit or district, one or the other of the parties would be deprived of a right which the law gives them, each being entitled to take a change.

Whether considerations of this character entered into the views of the legislature or not, we think that as the law contains no restriction as to the county to which a cause may be sent, we have no authority whatever for saying it shall not be sent out of the circuit or district. It is ably and earnestly urged by the counsel for the appellee, that inasmuch as there is no provision expressly authorizing a cause to be sent out of the circuit or district, it cannot be done. But why, in ordering a change, be limited to the circuit or district? What have these divisions to do with the question where the cause should be sent? Absolutely nothing, unless we interpolate into the statute a restriction, not only not found in it, but not implied from any thing in it or from the nature of the subject.

A later statute (3 Stat. Ind. 546) provides for a change of venue in certain actions, from the circuit or district, but this act does not furnish even a legislative interpretation of the former statutes in favor of the appellee. Under the former statutes, as we construe them, upon a proper application, the court could send a cause to some other county of the circuit or district, or to some county out of the circuit or district. Under the later statute, it is imperative on the court or judge, upon the proper application, to send the cause out of the circuit or district. There is nothing in the later statute that implies the want of authority under the former law to send a case out of the circuit or district, but the object of the later law was to make it imperative that it should be sent out in cases therein provided for.

We are of opinion that the order of the court below was erroneous, and, therefore, that it must be reversed.

The judgment below is reversed, with costs, and the cause remanded, with instructions to the court below to reinstate the cause.

J. H. Brown, for appellant.

W. Z. Stuart, for appellee.

Stone *v.* The State, on the Relation of Milhorn.

Bastardy.—*Practice.*—In a prosecution for bastardy, the defendant, though not present in the circuit court or court of common pleas, may appear by attorney, have a jury trial, cross-examine witnesses, and introduce witnesses for the defense.

APPEAL from the Monroe Common Pleas.

Pettit, C. J.—This was a prosecution for bastardy. The proceedings before the justice are not in the record—no complaint sworn to, as required by the statute, warrant,

recognizance, or transcript. There is therefore no foundation on which this suit can stand.

A motion was made to dismiss it before the answer was put in, which was overruled, but which ought to have been sustained. After an answer of general denial was put in by attorney, in the common pleas court, a recognizance was given, and by agreement of the parties the case was specially set for a certain day of the term. On that day, the defendant did not appear in person, and, over the objection of his attorney of record, he was defaulted, and a forfeiture was entered; and, over a like objection of the attorney, the case was tried by the court without a jury; and the court would not allow the attorney to appear in the case, or ask a single question by way of cross-examination, because the defendant was not present, but did allow him to object and except, and did sign bills of exception showing these facts. This is declared by statute and repeated rulings of this court to be a civil suit, and that the trial shall be governed and conducted in the proceedings in all respects as a civil suit or action. In such a suit, though not present in person, the defendant may appear by an attorney, have a jury trial, cross-examine witnesses, and introduce others for the defense. These rulings of the court were erroneous, and for them the cause must be reversed.

Judgment reversed, at the costs of the appellee. Cause remanded for further proceedings, &c.

R. L. Coffey, *W. R. Harrison* and *W. S. Shirley*, for appellant.

J. S. Hester, for appellee.

WHITE *v.* HAYNES.

TRUST.—*Pleading.*—*Parties.*—Complaint by A. against B., alleging that the plaintiff was the widow of C., who at his death was treasurer of a certain county; that the defendant and others were the sureties on his official bond; that subsequent to C.'s death it was represented to the plaintiff that he was a defaulter in said office, and that his said sureties would have to pay the deficiency; that, for the purpose of saving said sureties from loss, she conveyed to B. certain real estate, on the following express condition: "This conveyance to" B. "is in trust that said land be sold and the proceeds applied towards a payment of the deficiency in the treasury of" said county "which is chargeable against" C., "late treasurer of said county, and his bail, and for no other purpose, said" B. "to be governed as to sale and price by the majority of the bondsmen of said" C.; that, in truth, there was no such deficiency; that none of the sureties had ever paid any thing by reason of their being such sureties; that if there ever was a deficiency and a consequent liability of the sureties, the right of action in favor of said county against said sureties had been barred by the statute of limitations; that the defendant had been in possession of said land from the date of said deed of trust, using it for his own purposes and advantage, enjoying the rents and profits, and keeping the plaintiff out of possession without right; that defendant had in no manner sold or conveyed the land or any part of it for the purpose of executing said trust; that there was not, and never had been, any necessity for a sale for the purpose declared in said deed; that the annual rents and profits of the land had been a certain sum; that the land was her own separate property; and that she had demanded a reconveyance, the possession, and an accounting for the rents and profits, which the defendant had refused. Prayer, for a reconveyance, possession, an accounting for rents and profits, and an injunction restraining the defendant from conveying the land during the pendency of the suit. A copy of the bond of C., as treasurer, and a copy of said deed of trust were filed with the complaint, which was sworn to.

Held, that the complaint stated facts sufficient to entitle the plaintiff to the relief prayed for.

Held, also, that it was not necessary or proper for the plaintiff to make the commissioners of said county parties defendants.

APPEAL from the Jay Circuit Court.

BUSKIRK, J.—The appellant filed a complaint in the court below against the appellee, to obtain a reconveyance of certain real estate, and an accounting for the rents and profits thereof. The complaint alleges, that the plaintiff is the widow of Alexander White, deceased; that her late

husband was, at the time of his death, the treasurer of Jay county; that the appellee and others were the sureties of the said White, on his official bond as such treasurer; that subsequent to his death, it was represented to her that her said husband was a defaulter in his said office, and that his sureties would have to pay such deficiency; that, for the purpose of saving the said sureties from loss, she, on the 9th day of December, 1857, conveyed to the appellee the tract of land described in the complaint, on the following express condition, namely: "This conveyance to the said Jacob M. Haynes is in trust that said land be sold and the proceeds applied towards a payment of the deficiency in the treasury of Jay county, Indiana, which is chargeable against Alexander White, late treasurer of said county, and his bail, and for no other purpose; said Haynes to be governed as to sale and price by the majority of the bondsmen of said Alexander White;" that, in truth, there was no deficiency in the account of the said White with the said county; that the said appellee, and none of the other sureties, had ever paid a cent to the said county, or to any person, by reason of their being such sureties; that if there ever was a deficiency and a consequent liability on the part of the sureties, the right of action in favor of the said county and against the said sureties had long since been barred by the statute of limitations; that the said appellee had been, from the date of the said deed of trust, in the possession of the said tract of land, using the same for his own purposes and advantage, enjoying the rents and profits thereof, and keeping her out of the possession of the same without right; that the appellee had in no manner sold or conveyed the said land, or any part thereof, for the purpose of executing the said trust; that there never had been, and was not then, any necessity for the sale of the same for the purposes declared in the said deed; that the annual rents and profits of the said real estate had been one hundred dollars; that the said real estate was her own separate property; and that she had demanded a reconveyance, the

possession, and an accounting for the rents and profits, which had been refused by the appellee.

The prayer of the complaint was for a reconveyance of the land, possession of the same, and an accounting for the rents and profits. The plaintiff also prayed for an injunction restraining the defendant from conveying the said premises until the final determination of the cause. Copies of the bond of the said White as treasurer and the said deed of conveyance were filed with and made a part of the complaint. The complaint was sworn to.

The appellee demurred to the complaint, and assigned for causes of demurrer that the complaint did not contain facts sufficient to constitute a cause of action, and that there was a defect of parties defendant, in this, that the commissioners of Jay county should have been made defendants. The demurrer was sustained, and excepted to. The plaintiff refusing to amend, judgment was rendered for the defendant, which was excepted to. The sustaining of the demurrer to the complaint is assigned for error, and this is the only question that is submitted for our decision. We think that the facts stated in the complaint constituted a good cause of action, and if true entitled the appellant to the relief prayed for. But it is insisted that there was a defect of parties; that the commissioners of Jay county should have been made defendants. We do not think they were either necessary or proper parties to the complaint. The demurrer admitted the truth of the matters alleged in the complaint. If the facts as alleged were true, the commissioners of Jay county had no interest in the controversy. It was averred that the said White as such treasurer was not a defaulter, and was not in any manner indebted to the county; and that if there ever was a right of action on his bond, it had been for several years barred by the statute of limitations. The appellee might in his answer or cross complaint have shown such a state of facts as would have made the commissioners necessary parties; and in that case he could have made them parties, and had

the cause delayed until they had been served with process. The court erred in sustaining the demurrer.

The judgment is reversed, with costs; and the cause is remanded, with instructions to the court below to overrule the demurrer to the complaint, and for further proceedings in accordance with this opinion.

L. Barbour and *C. P. Jacobs*, for appellant.

W. March, for appellee.

Rogers *v.* The State.

Jury.—*How Impanelled.*—In the criminal circuit court, a jury of bystanders was called, by order of the court, to try an indictment, there being thereon none of the jurors of the regular panel, they being engaged in deliberation upon another cause, which had been submitted to them. The defendant in said indictment objected to be tried by the jury thus called, and demanded to be tried by the regular panel, but his objection was overruled.

Held, that this was error.

Criminal Law.—*Larceny.*—*Mental Condition.*—*Use of Opium.*—On the trial of an indictment for larceny, it having appeared in evidence that the defendant was addicted to the habitual and excessive use of opium in some of its forms, and that at the time of the supposed larceny he had been deprived of his accustomed supply of the drug, he sought to prove by competent testimony what effect such deprivation would have upon his mental condition.

Held, that the evidence so offered was admissible, as tending to show whether the defendant was in such a condition mentally as to be able to commit a larceny.

APPEAL from the Tippecanoe Criminal Circuit Court.

Worden, J.—The appellant was indicted for larceny, tried, convicted, and sentenced to imprisonment in the state prison.

On the calling of the cause for trial, the jurors of the regular panel were engaged in deliberation upon a cause which had been submitted to them; and, thereupon, the court ordered a jury of bystanders to be called for the trial

of this cause, which was done; none of the regular panel being upon the jury thus called. The defendant, by his counsel, objected to being tried by the jury thus called, and demanded to be tried by the regular panel; but his objection was overruled, and he excepted.

The defendant was clearly entitled to a trial by jury; and we think it quite as clear that he was entitled to a trial by a jury constituted in some mode provided for by law. Twelve men promiscuously brought together, in a manner not authorized by law, do not constitute a jury such as a person charged with a crime has a constitutional right to demand as his triers. If, under the circumstances, the court had no legal right, against the defendant's consent, to call a jury for the trial of his cause, composed wholly of bystanders, then a fatal error was committed, for which the judgment must be reversed.

We have looked through the statutes on the subject of selecting and impanelling juries, and find nothing that, in our opinion, authorizes the course pursued, under the circumstances.

It may be quite convenient, and quite conducive to the dispatch of business, to proceed with the trial of causes by a jury of talesmen, while the regular panel is engaged in deliberation; but on the other hand, if a party is allowed the regular panel, he escapes some hazard of being made the victim of designing men or professional jurors, who may throw themselves in the way in order to be placed on the jury.

The statutes provide amply for the selection of juries. 2 G. & H. 30. The second section provides that on the first day of the court, the list shall be called, and if twelve do not appear, the court shall cause the sheriff to summon others to supply the deficiency; and if, on the calling of a cause for trial by jury, the panel should not be full, the court shall direct it to be filled. The third section provides for the discharge of the jury at the end of three days from the commencement of the term, if their services are not needed;

but that if, after such discharge, a jury be demanded, the court shall direct one to be summoned. The sixth section provides that no challenge to the array shall be permitted because of any informality in the impanelling or selecting of such jury. The words "such jury" have reference to any jury impanelled under the circumstances provided for in the act, and to none other.

A later statute provides that where the proper officers have failed to draw or impanel a jury, or where for any cause no traverse jury shall be present at any term of the court, the court may order the sheriff to summon a jury of bystanders, who shall constitute the regular panel for the term. 2 G. & H. 32. Thus it will be seen that there is provision for filling up the regular panel where it is not full, and for impanelling a jury where there is no regular panel; but there is no provision for impanelling a jury of bystanders where there is a regular panel in attendance upon the court. In the criminal code there is this provision: "When a jury trial is demanded, the sheriff shall call a jury in the manner prescribed by law, or as directed by the court." 2 G. & H. 408. The last clause of this provision, "*or as directed by the court,*" does not imply a power on the part of the court to direct the calling of a jury of bystanders, against the consent of the party to be tried, where there is a regular panel of jurors in attendance; nor does it authorize the court to direct the sheriff to call a jury in any other manner than such as is authorized by law. There is ample scope provided for the direction of the court in the statutes above cited. We are of opinion that the ruling of the court was erroneous, and therefore, that the judgment must be reversed.

We are also of opinion that an error was committed on the trial of the cause. It appeared from the evidence that the defendant was addicted to the habitual and excessive use of opium in some of its forms; and there was evidence from which it might be inferred that, at the time of the

supposed larceny, he had been deprived of his accustomed supply of the drug. He sought to prove by competent testimony what effect such deprivation would have upon his mental condition, but the evidence was rejected. We think the evidence was competent, as tending to show whether or not he was, at the time, in a condition mentally, such as to be able to commit a larceny.

The judgment is reversed, and the cause remanded; the opinion to be certified at once, and the clerk directed to give the proper notice for a return of the prisoner.

F. J. Mattler, for appellant.

B. W. Hanna, Attorney General, for the State.

McCormick *v.* Hyatt.

Fraudulent Sale.—*Creditors.*—To render a sale for a valuable consideration void for fraud as against the creditors of the vendor, the vendee must have had notice of the intended fraud.

Appointment of Judge.—*Jurisdiction.*—In a civil action in the circuit court, the court having jurisdiction of the subject-matter and the parties, a change of venue was taken from the regular judge of said court, and he called another judge to try the cause, who appeared and made some orders, and, by consent of the parties, continued the cause till the next regular term of said court. At the next term, the appointed judge did not appear, and the regular judge set down the cause for trial on a subsequent day of that term before another judge, who tried the cause without objection from either party.

Held, that the judge who tried the cause had jurisdiction of the subject-matter and of the parties.

Parties.—*Husband and Wife.—Suit by Wife.*—In an action by a married woman concerning her separate property, the husband not himself joining in the complaint, in which the plaintiff alleged that she was a married woman, and therefore *she* joined her husband as a party plaintiff;

Held, that there was no error in the fact that nothing was said as to the husband in the verdict or judgment; nor, it seems, would this have been error had the husband been made a party plaintiff properly, by himself joining in the complaint.

PRACTICE.—*Trial Without Issue.*—*Supreme Court.*—The fact that there was a trial without an issue cannot be taken advantage of in the Supreme Court without having been noticed below.

APPEAL from the Daviess Circuit Court.

PETTIT, C. J.—Appellee, a married woman, brought suit against appellant, as sheriff, for the value of her separate personal property, levied upon and sold by virtue of two executions against her husband and another.

The giving of the seventh instruction is assigned for error. That instruction is, that, to make a sale void for fraud as against the creditors of the vendor, the vendee must have had notice of the intended fraud, if his purchase was in good faith and for a valuable consideration.

There was no error in giving this instruction. *Palmer* v. *Henderson*, 20 Ind. 297; *Bunnel* v. *Witherow*, 29 Ind. 123. The rulings on this question are so uniform that it is unnecessary to make further citations.

The evidence is not in the record, and we cannot say whether the court erred or not in refusing a new trial on it. We must presume that the evidence justified giving all the instructions, the finding of the the jury, refusal of a new trial, and the final judgment of the court.

It is objected that the judge who tried the cause had no jurisdiction of the subject-matter of the case or of the parties thereto. A change of venue was taken from the regular judge, and another judge called to try the case, who appeared, took his seat, made some orders, and by consent of the parties continued the cause till the next regular term of the court. At the next term, the appointed judge did not appear, and the regular judge set down the case for trial on a subsequent day of that term, before another judge, who took a seat on the bench, and tried the cause, without any objection from either party. There was no error in this, the latter judge having full jurisdiction of both the subject-matter and of the parties.

It is objected that neither the finding of the jury nor the judgment of the court says anything as to the husband

of the appellee, he (as is alleged) being a party to the suit. It is a sufficient answer to this to say, that the husband was not a party to the suit. Both paragraphs of the complaint say, that Susan G. Hyatt complains of the defendant for taking her individual, or separate property and selling it, &c. She alone complains, and she might have brought and maintained this suit without naming her husband. 2 G. & H. 41, sec. 8. It is true that at the very close of the complaint she says, that she is a married woman, and therefore she joins her husband as a party plaintiff. This does not make him a plaintiff. Had he been such, he must have joined her in her complaint and statement of her cause; nor would the leaving out his name and all reference to him in the finding and judgment have been an error if he had been properly made a party, as the suit was for injury to her separate rights of property.

It is assigned for error that there was a trial without an issue. The record says that the "issues were closed;" but if they were not, that cannot be taken advantage of here without having been noticed below; nor can we see that in this or any other proceeding in this cause the substantial rights of the appellant were erroneously affected. 2 G. & H. 122, sec. 101.

The judgment is affirmed, with five per cent. damages and costs.

J. W. Burton and *W. R. Gardiner*, for appellant.

N. F. Malott and *T. R. Cobb*, for appellee.

ADDRESS AND RESOLUTIONS

RELATIVE TO THE DEATH OF

Hon. Jeremiah Sullivan.

On the thirty-first day of the November term, 1870, being the 3d day of January, 1871, the following proceedings were had:

Hon. Joseph E. McDonald addressed the court and said:

May it Please the Court:—I have been deputed by my brothers of the bar to make formal announcement of a sad event, by the news of which you have already been pained.

Hon. Jeremiah Sullivan, who was one of the judges of this court from the year 1835 to the year 1846, died suddenly at his home, in Madison, Indiana, on the 6th day of December, 1870.

It is the sentiment of my brothers of the bar, that the death of one to whom the jurisprudence of the State owes so much should be noticed in fitting terms upon the records of the high court to which his labors in former years contributed so much of character and respect.

As a judge, he was learned and inflexibly just, and an ornament to the bench. As a practicing lawyer, he was able and honorable, and an ornament to the profession. As a sincere Christian, he was an ornament to the church. As a man of exalted personal character, he was an ornament to society.

I respectfully move, your Honors, that the following resolutions of the bar be ordered spread upon the records of the court.

Mr. McDonald then read as follows:

At a meeting of members of the Bar of the Supreme Court of Indiana, held at the Supreme Court room, on the 2d day of January, 1871, convened because of the recent death of Jeremiah Sullivan, a former judge of the court, the following resolutions were adopted:

Resolved, That it is fitting that some suitable expression of regard for the memory of Judge Sullivan should be preserved among the records of the high court over which he once presided.

Resolved, That, in the sense of the legal profession of this State, the name of Jeremiah Sullivan should be prominently inscribed in the list of those learned and able judges to whom Indiana will ever remain indebted for their services in laying the firm foundation of its jurisprudence.

Resolved, That we will cherish the memory of Judge Sullivan as that of a learned and upright judge, a devoted Christian, and a man of unsullied purity and integrity of character.

Hon. ROBERT C. GREGORY, on behalf of the court, responded as follows:

GENTLEMEN OF THE BAR:—In responding for the court to the motion just submitted, I can say that it affords me melancholy pleasure to endorse every word that has just been uttered.

My acquaintance with Judge Sullivan commenced at the May term of this court in the year 1839. I have met him on the bench, in private circles, and as a Christian brother. As a judge he was pre-eminent for his purity and sterling integrity. In this respect he was above criticism. He was a man of sound judgment. His opinions are marked for clearness in statement. Whilst he, like every good magistrate, bowed to the majesty of the law, he was ever anxious to get at the justice of the case. As an old citizen of the State, he will ever be remembered with pride and satisfaction.

He was, in the best sense of that expression, "a follower of Christ." His heart was in the right place. He was open handed in his charities, forbearing and kind in his intercourse with his fellow man. His family has the warmest sympathies of every member of this court.

We direct that the resolutions just offered be spread upon the records of this court, and that a certified copy be furnished to the family of the deceased.

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1. *Constitutional Law.*—Section 21 of article 4 of the constitution of this State requires that in revising an act or amending a section, the act or section shall be set forth and published at full length as revised or amended, but does not require that the old act or section shall be set forth and published; though, if this be done, it will not render the revision or amendment invalid, but the old act or section will be regarded as surplusage. *Draper* v. *Falley et al*.....465

2. *Same.—Court of Common Pleas.—Fifteenth District.—Times of Holding Court.*—The act of March 9th, 1861 (Acts 1861, p. 56), amending the fifteenth section of the act of

March 5th, 1859 (Acts 1859, p. 84), and fixing the times of holding the court of common pleas in the counties of Benton, White, Carroll and Tippecanoe, is not in conflict with section 21 of article 4 of the constitution, and, by implication, repealed said fifteenth section. The substitution in said act of 1861, of the word "while" instead of the words "as long as," in attempting to recite said fifteenth section, does not affect the validity of the act. *Ibid.*

3. *Act of May 31st, 1861.*—The act of May 31st, 1861 (Spec. Sess. p. 38), attempting to amend said fifteenth section of said act of 1859, is invalid as an amendatory act, because it attempted to amend a section which had no existence. Nor is it valid as an original act..... *Ibid.*

4. *Constitutional Law.*— Under section 21 of article 4 of the constitution of Indiana, a section of a statute cannot be amended without setting forth and publishing at full length the *whole* section as amended, however long it may be, or into however many clauses it may be divided. *Town of Martinsville* v. *Frieze*.....507

ANIMALS.

See TRESPASSING ANIMALS.

Injury to. See RAILROAD, 3, 4.

ANOTHER ACTION PENDING.

Set-Off.—Decedents' Estates.—A judgment for costs against a decedent's estate, to enforce which a suit by the judgment-plaintiff against the administrator upon his bond is pending and undetermined, cannot be set up as a set-off in a suit by said administrator against said judgment-plaintiff upon a note executed by the latter to the decedent. *Naves* v. *Wilson, Adm'r*.....294

APPEAL.

See CASES OVERRULED, 4; CITY, 1, 7; DIVORCE; INJUNCTION, 2; LIQUOR LAW, 6; TURNPIKE, 6, 15, 16.

1. *Default.*—Where a judgment has been taken against a defendant by default, on a complaint which does not state facts sufficient to constitute a cause of action, he may appeal to the Supreme Court, assigning the insufficiency of the complaint as error, without having made a motion for relief below. *Strader et al.* v. *Manville, Treas.*..111

2. *County Commissioners.*—A board of county commissioners dismissed a proceeding to contest the election of a county commissioner; whereupon the contestor prayed an appeal to the circuit court, and filed an appeal bond within proper time, which was approved by the county auditor, who failed to file the transcript and papers in the office of the clerk of said court within twenty days after the filing of said bond, and until the expiration of two months.

Held, that this delay of the auditor was not good cause for the dismissal of the appeal by the circuit court. *Barnes* v. *Modisett*, 3 Blackf. 253; *Brown* v. *Modisett*, *id.* 381; and *Butler* v. *Skomp*, *id.* 392, overruled. *Day* v. *Herod*.....197

3. *Same.*—A. contested the election of B. as county treasurer. The latter appealed from the decision of the county commissioners to the circuit court, and in proper time filed a bond, which contained no penalty, with the auditor, who failed to file a transcript and the papers in the cause in the office of the clerk of said court for more than fifty days after the bond was filed. In the circuit court, B. moved to dismiss the cause; pending which motion, A. moved to dismiss the appeal. The latter motion was sustained, after which B. tendered a proper bond and asked to have the appeal reinstated, which the court refused.

Held, that said motion to dismiss the appeal had precedence over said motion to dismiss the cause.

Held, also, that the failure of the auditor to file the transcript and papers in the clerk's office within twenty days after the appeal was taken was no cause for the dismissal of the appeal.

Held, also, that the fact that the appeal bond contained no penalty was

good cause for dismissing the appeal.

Held, also, that the offer to file a new bond, if allowable at any time, came too late after the appeal had been dismissed. *Barnett* v. *Gilmore*.....199

4. *Recognizance.—Justice of the Peace.* A defendant in a prosecution before a justice of the peace for retailing intoxicating liquor without a license was fined, and within the time allowed by law appealed to the court of common pleas. Instead of entering into a recognizance in the form prescribed by statute in such cases, he gave an appeal bond, conditioned as follows: "Now, if the said" A. B. "shall prosecute his said appeal to effect and pay the judgment that shall be rendered against him on said appeal in said common pleas court, then this bond shall be void." On motion of the prosecuting attorney, the case was stricken from the docket, over the defendant's objection.

Held, that said bond was a substantial compliance with the law, and that the court erred in striking the case from the docket. *Vierling* v. *The State*.....218

5. *Criminal Law.*—In a criminal case, the defendant may appeal, only when the judgment below is against him. *Musselman* v. *The State*...267

6. *County Commissioners.*—On an appeal to the circuit court from the decision of the board of county commissioners in a proceeding to contest an election to the office of township trustee, the circuit court cannot remand the cause to said commissioners for trial and determination, but must finally determine it as an original action. *Mandlove* v. *Pavy*.....505

APPEARANCE.

See BASTARDY, 2; INJUNCTION, 7; INSANE PERSON, 1.

Withdrawal of. *See* JUDGMENT, 4.

ARRAIGNMENT.

See CRIMINAL LAW, 13.

ARREST OF JUDGMENT.

See INSANE PERSON.

ASSAULT AND BATTERY.

See CRIMINAL LAW, 3.

Damages.—Agreement to Fight.—It is not a bar to an action for damages for an assault and battery, that the plaintiff and defendant fought with each other by agreement or mutual consent, and the injury complained of was inflicted in sudden heat arising in such fight without previous malice; but such agreement or consent may be shown in mitigation of damages. *Adams* v. *Waggoner*..531

ASSESSMENT.

See CITY; DRAINING ASSOCIATION; TURNPIKE.

ASSIGNEE.

See PLEADING, 12, 13; PROMISSORY NOTE, 1. 2. 3. 5.

ASSIGNMENT OF ERROR.

See EXECUTION, 2, 3.
See SHAW v. SPENCER, 143.

New Trial.—All the causes specified in a motion for a new trial are presented to the Supreme Court by an assignment that the court below erred in overruling the motion for a new trial. *The Bellefontaine R. W. Co.* v. *Reed*.....476

ATTACHMENT.

See INJUNCTION, 3; PROCESS, 1, 2.

ATTORNEY'S FEES.

See PROMISSORY NOTE, 6.

AUDITOR.

Of county. *See* TAX, 6, 7.

B

BAGGAGE.

See COMMON CARRIER, 2, 3.

BANK STOCK.

See TAX, 1 to 8.

BASTARDY.

See ESCAPE.

1. *Evidence.—Error Cured.*—On the trial of a prosecution for bastardy, the child, with the paternity of which the defendant was charged, being present in court, the defendant on cross examination said, "The child is not mine; I have one at home that looks more like me than this child." The counsel for the relator then, over the defendant's objection, was permitted to hold the child up before the jury for inspection by them, as evidence to prove that the child favored the defendant, the court remarking, that as the child had been in the presence of the jury during the trial, they could not be prevented from looking at it; and immediately thereupon, before the argument of counsel, and also in an instruction to the jury after the argument, the court told the jury that in determining the case, they must look to and consider only the oral testimony, and not the resemblance or non-resemblance of the child to the defendant.

Held, that the error in the admission of the improper evidence was cured. *Reitz* v. *The State, ex rel. Holden*.187

2. *Practice.*—In a prosecution for bastardy, the defendant, though not present in the circuit court or court of common pleas, may appear by attorney, have a jury trial, cross-examine witnesses, and introduce witnesses, for the defense. *Stone* v. *The State, ex rel. Milhorn*.....538

BEER.

See LIQUOR LAW, 2, 4.

BILL OF EXCEPTIONS.

See EVIDENCE, 16.

1. *Time of Signing.*—Where time beyond the term at which final judgment was rendered has been given, in which to prepare and settle a bill of exceptions, and the bill appears by the judge's certificate thereto to have been presented to him and signed after the expiration of the time so limited, it cannot constitute a part of the record. *Thompson* v. *Eagleton*.....300

2. *Pleading Stricken Out.*—Where a paragraph of pleading is stricken out, the ruling will not be examined by the Supreme Court if the paragraph be not brought into the record by a bill of exceptions. *Indianapolis Piano Manuf'g Co.* v. *The First National Bank*.....302

3. *Motion for New Trial.—Recitals Therein*—Statements contained in a motion for a new trial as to alleged errors committed by the court will not be taken as true by the Supreme Court, unless the recitals be shown to be true by a bill of exceptions.....*Ibid.*

4. *Affidavit for Continuance.*—An affidavit in support of a defendant's motion for a continuance in a criminal action cannot be made a part of the record except by a bill of exceptions. *Gandolpho* v. *The State*.439

5. *Motion to Strike Out.*—Where a motion to strike out a paragraph of a pleading is overruled, the Supreme Court will not examine as to the correctness of the ruling, if an exception thereto be not saved by a bill of exceptions. *Weston* v. *Lemley*.....486

BILL OF LADING.

See COMMON CARRIER, 1.

BILL OF PARTICULARS.

See PLEADING, 9.

BOND.

See COSTS, 1; OFFICE AND OFFICER, 1; PRINCIPAL AND SURETY, 1, 2; DECEDENTS' ESTATES, 2.

BOUNTY.

See SOLDIER.

BRIBERY.

See CRIMINAL LAW, 4.

BURDEN OF PROOF.

See DAMAGES, 4.

C

CASES OVERRULED, CRITICISED, &c.

1. *Ditching Company.—Pleading.*—The ruling in *West* v. *Bullskin Prairie Ditching Co.*, 19 Ind. 458, that a complaint to enforce an assessment made by a draining company must contain a description of the drain, said to be placed upon a reason which will not bear examination. *The Jordan Ditching and Draining Co.* v. *Wagoner*.....50
2. *Measure of Damages.—Jones* v. *Van Patten*, 3 Ind. 107, overruled. *Dunn et al.* v. *Johnson*.....54
3. *Agency.—Ellsworth* v. *Pomeroy*, 26 Ind. 158, said to be a close case. *Ellsworth et al.* v. *Mace*.....73
4. *Directory Statute.—Time.—Appeal.—Barnes* v. *Modisett*, 3 Blackf. 253; *Brown* v. *Modisett*, *id.* 381; and *Butler* v. *Skomp*, *id.* 392, overruled. *Day* v. *Herod*.....197
5. *Criminal Law.—Desecration of the Sabbath.—Indictment.—Wetzler* v. *The State*, 18 Ind, 416, criticised. *Eitel* v. *The State*.....201
6. *Evidence.—Venue.—Jackson* v. *The State*, 19 Ind. 312, disapproved. *Wiles* v. *The State*.....206
7. *Appointment of Judge.—Barnes* v. *The State*, 28 Ind. 82, criticised. *Watts* v. *The State*.....237

CAVEAT EMPTOR.

See SALE, 1, 2.

CERTIFICATE.

See DEPOSITION, 1; EVIDENCE, 18.

CHURCH.

See STATUTE OF FRAUDS, 1.

CIRCUIT COURT.

See INJUNCTION, 5, 6; JURISDICTION, 1; TURNPIKE, 15, 16.

CITY.

See EVANSVILLE; INJUNCTION, 4.

Street improvement; contractor's bid. *See* EVIDENCE, 15.

1. *Street Improvement.—Precept.—Appeal.*—On an appeal from a precept issued for the collection of an assessment for a street improvement in a city incorporated under the general act of 1867, it is a sufficient answer, that at the date of the estimate on which such precept was issued the person taking the appeal owned, and has since owned, only a portion of the lot against which the precept is directed, which portion does not adjoin the street improved. *Romig* v. *The City of Lafayette*...30
2. *Same.*—Where an assessment for a street improvement has been made upon a lot as being owned by two persons jointly, an answer on an appeal by one of such persons from a precept issued for the collection of such assessment, alleging that said persons were, at the date of the estimate, and still are, owners in severalty of distinct parts of the lot, presents a good defense.....*Ibid.*
3. *Same.—Mandate.*—Where, the common council of a city incorporated under the general law of 1867 having approved an estate of work done under a contract for grading a street of said city, duly made by the city engineer, according to the contract, and having ordered the payment thereof to the contractor by the adjacent property holders on said street, and some of said owners having refused to pay, the council afterwards rescinded its order approving said estimate and adopted and approved another estimate for a less amount than was due under the contract;

Held, that if the power of the council over the estimate was exhausted when it had first approved it and directed its payment, and said rescission was therefore void, the only relief the contractor could obtain by mandate would be to compel the council to issue a precept on said first estimate; and the complaint for a mandate must allege that an affidavit had been filed as required by section 71 of said act of 1867.

Held, also, that if the council had power to so revise its action, a mandate would not lie to direct what the decision of the question involved

should be. *The City of Indianapolis* v. *Patterson et al*.....157

4. *Lighting Streets.—Statute Construed.*—In the sixty-eighth section of the act of 1867, for the incorporation of cities, the words, "for lighting such street according to the general plan of such improvement in said city," embrace the street fixtures necessary for the purpose referred to, including the pipes and lamp posts; and in the twenty-eights clause of the fifty-third section, the words, "the expense of lighting any street," refer only to the expense of lighting after the fixtures have been put up. In the former case, the expense cannot properly be assessed upon real property in proportion to its appraised value. *Nelson* v. *The City of Laporte et al*.....258

5. *Street Improvement.— Change of Grade.— Statute Construed.*— The provision of the twenty-seventh section of the act for the incorporation of cities (Acts 1867, p. 33), that when the grade of a street has been once established, it shall not be changed without first assessing and tendering the damages occasioned by the change, refers to damages as well to property outside of the city limits as to that inside. *The City of Columbus* v. *The Hydraulic Woollen Mills Co*.....435

6. *Same.— Injunction.*— A hydraulic company operated a woollen mill propelled by water supplied by an artificial race, the water from which was used also in coloring the goods manufactured, pure water being required for that purpose. A city incorporated under said act of 1867 was rapidly cutting a ditch for the draining of its streets, to discharge into said race, which would so contaminate the water thereof with filth as to make it unfit for coloring; and this would be accomplished in two or three days, if not arrested; and it would also carry sand into said race, obstructing the flow of water to the mill. Said city was making said ditch as a part of the work of grading a certain street according to a new and changed grade thereof, a different grade having been previously established, and the damages to said company resulting from such change of grade had not been assessed or tendered. Said race at the point of intersection with the proposed ditch was outside of the city, its margin being the boundary of the city.

Held, that said company was entitled to an injunction to prevent the city from cutting said ditch into the race (the majority of the court basing this conclusion on said provision of section 27 of the act of 1867; ELLIOTT, J., holding that the fact that the city was changing the grade of the street did not affect the question, but that the city had no authority or right to conduct the drainage of its streets into the race, the private property of said company, and thereby destroy the use for which it was constructed, nor could such power be conferred except by the exercise of the right of eminent domain)..*Ibid.*

7. *Same.— Precept.— Affidavit.*— A lot in a city was sold under a precept for the collection of an assessment for the improvement of a street by grading and graveling, issued upon an affidavit of the contractor stating that, *under the estimate* made by the city engineer, $83.84 was assessed against this lot, and that the owner, for the space of twenty days after the date of the estimate, had failed and refused, and still refused to pay the same, except the sum of sixty dollars, which he had paid. The contractor's bid for making the improvement was one dollar per foot, and at that price it was contracted and the work was done. The front line of said lot was eighty-two and one-half feet long.

Held, that no appeal from the precept was necessary, in order to raise the question of the authority of the council to issue it; but that it was absolutely void, and the city treasurer could not, under it, pass title by a sale of the property. *Wilson* v. *Poole*.....443

CLERICAL ERROR.

See JUDGMENT, 1.

COLLATERAL PROCEEDING.

See JUDGMENT, 3, 4; PROCESS, 1, 2.

COLLATERAL SECURITY.

Where a creditor has obtained a judgment, which is collectable, on a note held by him as collateral security, he will not be thereby prevented from availing himself, to the extent of his entire claim, of another note held by him as collateral security for the same claim. *Smith* v. *Hunter* 106

COMMISSION.

See OFFICE AND OFFICER, 2.

COMMON CARRIER.

See STOPPAGE IN TRANSITU.

1. *Bill of Lading.—Conditions as to Delivery.*—A. delivered to a railroad company at a station on its road a quantity of flour owned by him, which was there placed on the cars of said company, to be shipped to B. at another station on said road, in pursuance of a contract between A. and B. for the sale of said flour by the former to the latter, to be so delivered on cars at said former station, and to be paid for on receipt of the bills of lading. At the time of said delivery, B. was insolvent, and A. received from the station agent of said company, authorized to receive and forward freights and furnished with blank bills of lading, at the station where the flour was so delivered, a bill of lading containing, besides the usual clauses, a provision, inserted at the request of A., that said flour should be delivered to B. upon the presentation of a duplicate of said bill of lading, and received also a second bill of lading in usual form marked "duplicate" across the face thereof, in which the clause in relation to presentation of duplicate was omitted by mistake of the agent. A. made his draft on B. for the purchase-money of the flour, and attached said duplicate thereto, and negotiated said draft to C., who in good faith paid value therefor, knowing the form, character, and contents of said original bill of lading, which was then indorsed and delivered by A. to C. as collateral security for the payment of said draft; and C. deposited said draft, with said duplicate attached, at the bank at which it was made payable, and the cashier of said bank presented the same to B. before the delivery of the flour to him, who failed and refused to pay said draft or any part of it, but accepted it by endorsement across the face thereof; and, three days of grace having been granted, said draft was protested for non-payment, and the next day C. produced said original bill of lading and said duplicate at the office of said railroad company, at the station to which said flour was to be shipped as aforesaid, and demanded said flour thereon; but said company failed and refused to deliver the flour, having delivered it to B., who was insolvent, and so continued to be, and who had shipped the flour out of the State.

Held, that the railroad company was liable to C. for the loss occasioned him by the delivery of the flour to B. *McEwen et al.* v. *The Jeff. Mad. & Ind'polis R. R. Co*.....368

2. *Place of Delivery.— Railroad.*—Where a railroad company is employed by a person to transport his baggage for hire from A. to B., stations on said company's road, and does not deliver the goods to him at B., but carries them to C., another station on said road, and there stores them in the company's depot baggage-room, the liability of the company as a common carrier is not thereby ended; and if the goods are stolen from the company at C. and thereby lost to said owner, the company will be liable to him for the damage sustained by him by reason of the failure to deliver the goods at B. *The Toledo, &c. R. W. Co.* v. *Hammond*.....379

3. *Baggage.*—Articles for use as baggage at the end of a journey or during a temporary stay at a particular place, are as properly baggage as those actually used in the transit, and may include an opera glass, though the entire journey be made at night.....*Ibid.*

COMPOUNDING CRIME.

See CRIMINAL LAW, 5.

CONSIDERATION.

See ACCORD AND SATISFACTION; NOVATION; PLEADING, 8; PRINCIPAL AND SURETY, 3.

Failure of. *See* SALE, 1, 2.

CONSTITUTIONAL LAW.

See AMENDMENT OF LAWS; COURT, 2; CRIMINAL CIRCUIT COURT, 1, 5, 6, 7, 9, 10; CRIMINAL LAW, 9; OFFICE AND OFFICER, 4; TAX, 2; TOWN, 2.

CONTINUANCE.

See BILL OF EXCEPTIONS, 4.

CONTRACTS.

See CONSIDERATION; CORPORATION, 1; EVIDENCE, 15; FRAUD, 1; MARRIAGE CONTRACT; NOVATION; PLEADING, 11; PRACTICE, 1; SALE; TRUST.

1. *Breach.—Damages.*—A. contracted to saw into lumber for B., at a stipulated price per hundred feet, to be paid at certain periods, a certain number of logs to be furnished by B. at A.'s saw-mill.

Held, in a suit by A. against B. for the failure of the latter to deliver a portion of the logs as agreed, that the fact that the plaintiff sold his saw-mill after he had been notified by the defendant that the latter would pay for no more sawing and deliver no more logs, or that the plaintiff made a sub-contract with a third person to saw the logs that might be delivered, could not affect the right of recovery or the measure of damages. *Dunn et al.* v. *Johnson*.....54

2. *Same.—Measure of Damages.*—On the breach of such an executory contract without sufficient cause, the measure of damages is the difference between the contract price of the entire work to be done and the reasonable cost of the work, at the ordinary prices, in labor, in wear and tear of machinery, in time of use of machinery, and in value of superintendence. The profits which have been realized by a sub-contract made with a third person to do the work, or which might have been realized by such a sub-contract if made, cannot be taken as evidence of such damages. This rule applies alike to public and private contracts, on a large or small scale. *Jones* v. *Van Patten*, 3 Ind. 107, overruled.....*Ibid.*

3. *Same.—Reduction of Damages.—Burden of Proof.*—In such a case, the burden rests upon the defendant of proving, in reduction of the damages estimated by such rule, that the plaintiff could have procured other work from which profits would have accrued.....*Ibid.*

4. *Failure to Receive Goods Contracted for.—Notice.*—A. contracted with B. to deliver to the latter a certain number of hoop-pools, at a stipulated price, at a certain railroad station by the last of November, B. to advance money to A. from time to time, to enable him to buy the poles, and B. to pay for the poles on final delivery. A portion of the poles were delivered on the contract, and B. advanced to A. money on the contract, more than sufficient to pay for the poles delivered. The remainder of the poles were placed by A. at said station, at a place pointed out by B., with those already delivered, and in the latter part of November A. notified B. that the poles were ready for delivery, and requested him to receive and pay for them, which B. declined to do, saying he was not ready to ship them. Late in December, A. told B. that if the latter did not come and receive and pay for the poles, the former would not keep them longer, and B. promised to receive them in ten days. In the latter part of the following January, A. gave B. written notice to receive and pay for the poles within eight days, or he would sell them to get the money due him on the contract. In the following March, A. sold, for their full value, to C., said remainder of the poles, not counted to B. as required by the contract, B. not having offered at any time until after said sale to receive and pay for them.

Held, that an action of replevin by B. against C., for the poles so purchased by the latter, would not lie. *Kirkpatrick* v. *Snyder et al*.....169

5. *Construction of.—Partnership.*—One of two partners in the business of brewers executed an agreement for the sale of "his whole interest in the brewery at," &c., "consisting of stock on hand, personal property, real estate, &c., &c.," describing certain town lots, "for the sum of," &c. *Held*, that said agreement, taken according to its terms, did not dispose of moneys on hand or on deposit belonging to the partnership, or of bills receivable or accounts in favor of the firm. *Garnier* v. *Gebhard et al*.....225

6. *Construction of.*—A. and B. made a written contract whereby the former agreed to let to the latter, for a certain period, the use of sufficient water to run a saw-mill, at a stipulated rental, which B. agreed to pay, A. reserving to his own use the surplus water, and, in consideration of the letting, B. also covenanted "to deepen the race at the saw-mill to bring it to the depth as it is in the head-gate at said race, with a gradual descent to the flume of said mill, and not to be less at the bottom of said race than" a certain number of feet. The contract, in a subsequent part thereof, contained a stipulation that B. was to have said race to use to keep his saw-logs in; and recited that it was also understood that he "can make the said race wider and deeper if he sees proper." *Held*, that under these provisions construed together without extraneous circumstances, the lessee was bound to deepen and widen the race to a certain extent specified, and had the privilege of making it still deeper and wider if he wished to do so. *Casad* v. *Davis et al*.....292

CONVERSION.

See DAMAGES, 5; OFFICE AND OFFICER, 1.

CORPORATION.

See CITY; DRAINING ASSOCIATION; MANUFACTURING, MINING, &C., COMPANIES; PARTIES, 2; PRINCIPAL AND AGENT, 3; RAILROAD; TOWN; TURNPIKE.

1. *Contract of.*—A corporation can make no valid contract except such as relates to the business and objects of the corporation; and all such contracts must be made either by the board of directors or by a duly authorized agent or attorney. *The Brooklyn Gr. R'd Co.* v. *Slaughter*.....185

2. *Officer.*—An individual officer of a corporation cannot by his acts bind the corporation, unless such acts are authorized or approved by the corporation.....*Ibid.*

COSTS.

Suit on Official Bond.—Where, in a suit commenced in the circuit court, or court of common pleas, on the relation of a township, upon the official bond of township trustee, the plaintiff recovers less than fifty dollars, exclusive of costs, the judgment not having been reduced below fifty dollars by a set-off or counter claim, the relator is required to pay costs. *The State, ex rel. Middle T'p*, v. *Parker et al*.....285

COUNTER CLAIM.

See PLEADING, 6.

COUNTY AUDITOR.

See EVIDENCE, 18; TAX, 6, 7.

COUNTY COMMISSIONERS.

See EVIDENCE, 18; SLANDER, 4, 5; SOLDIER; TRUST, 5.

Appeal from. *See* APPEAL, 2, 3, 6; LIQUOR LAW, 6; TURNPIKE, 6, 7.

COUNTY TREASURER.

See TAX, 6, 7.

1. *Commission for Disbursing School Tax.—Statute Construed.*—The provision of section 107 of the school law (3 Stat., Davis, 461) allowing to county treasurers a commission of one per cent. "on the amount of school tax disbursed," refers not only to the tax levied by the State, to be used exclusively for tuition, but also to that levied by the townships, under section 12 of said act,

to be expended for building school houses, &c. *Myrick* v. *The Commissioners of Montgomery Co.*.....383

2. *Same.—Taxes Returned Delinquent by Mistake.*—Where a county treasurer by mistake returned as delinquent certain taxes which had been paid, and such taxes, with the ten per cent. penalty added thereto, were carried to the tax duplicate for the next year; and said treasurer on his final settlement with the county board, paid over, under protest, the amount of said penalty, never collected by him;

Held, that he was entitled to recover, in an action against said board, the amount so paid under protest....*Ibid.*

COURT.

1. *Court Room.—Repairing and Furnishing.*—Courts of record, authorized to use a seal, and having jurisdiction beyond that of justices of the peace, have power in this State to order the repairing and furnishing of their court rooms. *Nash, Aud.*, v. *The State, ex rel., &c.*.....78

2. *Local Laws.—Creation of Inferior Courts.*—For the creation of courts inferior to the circuit court, the legislature has power to pass laws local to one or more counties whose circumstances may so require, where such laws, if of uniform operation throughout the whole State, would be elsewhere mischievous, useless, or burdensome. *Clem* v. *The State.*418

COURT OF COMMON PLEAS.

See INJUNCTION, 5, 6; JURISDICTION, 1; JUDGE, 2.

Of Fifteenth District. See AMENDMENT OF LAWS, 2, 3.

COURT ROOM.

See COURT, 1.

CRIMINAL CIRCUIT COURT.

See CASES OVERRULED, &c., 5; COURT, 2; CRIMINAL LAW, 6; JUDGE, 1; JURY.

1. *Of Jefferson County.—Constitutional Law.*—There is no constitutional objection to such special legislation as that by which the Criminal Circuit Court of Jefferson county was created (Acts 1869, p. 49); and it was immaterial to the valid existence of said court whether said county had such a population as under other acts would have authorized the organization of the court. *Eitel* v. *The State*.....201

2. *Same.—Grand Jury.*—Said court had all the machinery of the circuit courts for the disposition of criminal causes, including a grand jury.....*Ibid.*

3. *Jurisdiction.—Misdemeanor.*—The criminal courts of this State have jurisdiction of misdemeanors....*Ibid.*

4. *Indictment for Misdemeanor.*—Misdemeanors may, in the criminal and circuit courts, be prosecuted upon indictment.....*Ibid.*

5. *Of Jefferson County.—Constitutional Law.—Grand Jury.*—The act creating a criminal circuit court in Jefferson county (Acts 1869, p 49) was constitutional and conferred on said court legal power to organize and impanel a grand jury. *Weis* v. *The State*.....204

6. *Same.*—The act creating the Criminal Circuit Court of Jefferson county (Acts 1869, p. 49) was valid, and authorized the impanelling of a grand jury in said court. *Wiles* v. *The State*.....206

7. *Constitutional Law.*—The criminal circuit courts of this State are not the circuit courts contemplated by sections 1, 8, and 13, of article 7 of the constitution, but are inferior courts in the same sense that the courts of common pleas are inferior. *Clem* v. *The State*.....418

8. *Construction of Statute.*—The valid existence of the criminal circuit court is not affected by the attempt in the statute to deprive the circuit court of jurisdiction in criminal matters, or by the seeming attempt to create a circuit within the boundary of another circuit.....*Ibid.*

9. *Marion Criminal Circuit Court.—Judge.—Tenure of Office.*—The provision of section 2, article 15, of the constitution that "the General Assembly shall not create any office, the tenure of which shall be longer than four years," has no application to a case where an office is created of which no tenure is fixed, as in

the act creating the office of judge of the Criminal Circuit Court of Marion county.....*Ibid.*

10. *Same.—Declared Constitutional.*—The Criminal Circuit Court of Marion county possessed a constitutional existence prior to the act of May 13th, 1869, defining the term of office of the judge thereof and legalizing the previous proceedings of the court, and had jurisdiction to try an indictment for murder...*Ibid.*

11. *Grand Jury.*—Where a grand jury was discharged by a criminal circuit court until a certain day, and appeared, not on that day, but upon the next day after;

Held, that said grand jury was not dissolved by its failure to appear at the day appointed.....*Ibid.*

12. *Sessions of Grand Jury.—Pleading.—Abatement.*—A plea in abatement in the criminal circuit court alleged, that *it appeared by the records* of said court as follows: that the indictment against the defendant was returned by the grand jury on the 20th of a certain month; that said grand jury was in session on the 29th of the next preceding month and thereafter continually till the date of the return of the indictment; and that there was no entry of record showing an adjournment or discharge of the grand jury between the days aforesaid.

Held, that the plea was bad, because it merely alleged evidence, and not the fact relied on—that the grand jury had been in session in the month in which the indictment was returned more than ten days before returning the indictment.....*Ibid.*

CRIMINAL LAW.

See APPEAL, 4, 5; BILL OF EXCEPTIONS, 4; CRIMINAL CIRCUIT COURT; EVIDENCE, 11; INSTRUCTIONS TO JURY, 1; LIQUOR LAW.

Perjury. See SLANDER, 4, 5.

1. *False Pretense.—Indictment.*—Indictment for obtaining under false pretenses "twenty-five dollars in money of the personal goods and chattles of," &c.

Held, on motion to quash, that the property was not described with sufficient particularity. *Smith* v. *The State*.....159

2. *Same.—Evidence.*—An indictment for obtaining money under a false pretense set out, as the pretense, a bank check without date; and it was averred that a more particular description of the check could not be given, because it had been torn and partially destroyed by the defendant. On the trial, a check dated "Ja. 16, 1869," was read in evidence, over the defendant's objection.

Held, that the admission of this evidence was error.....*Ibid.*

3. *Information.—Rescue of Prisoner. Assault and Battery.*—Under an information for forcibly freeing a person from legal arrest, an assault and battery also being sufficiently charged against the defendant, as the means by which the rescue was accomplished, the defendant may be convicted of the assault and battery and acquitted of the rescue. *Rose* v. *The State*.....167

4. *Prosecuting Attorney.—Bribery.*—A prosecuting attorney is an officer entrusted with the administration of justice, within the meaning of section 39 of the act defining felonies, &c., 2 G. & H. 450. *The State* v. *Henning*..... 189

5. *Compounding Crime.—Indictment.*—An indictment under section 2 of the act in relation to the compounding and concealing of crimes, &c., Acts 1867, p. 104, must charge that the defendant had knowledge of the actual commission of the crime which it is alleged he agreed to compound, conceal, &c.....*Ibid.*

6. *Jurisdiction.—Vanderburgh Criminal Circuit Court.*—A grand jury was impanelled in the Circuit Court of Vanderburgh county, and an indictment was returned by said jury into said court, after the act creating the Vanderburgh Criminal Circuit Court went in force, but before the first term of the latter court.

Held, on motion to quash, in the Vanderburgh Criminal Circuit Court, to which the case was transferred, that the court in which the indictment was found had no jurisdiction of the subject-matter.....*Ibid.*

7. *Desecration of the Sabbath.—In-*

dictment.—An indictment charged that the defendant, at, &c., "being over fourteen years of age, on the 13th of June, 1869, being Sunday, was found unlawfully at common labor, engaged in his usual avocation, to wit, selling and delivering to" J. O. "two quarts of beer, and receiving from him twenty-five cents in payment therefor," &c., the statutory exceptions being negatived.

Held, on motion to quash, that the indictment sufficiently charged an act of common labor, within the meaning of the statute. *Wetzler* v. *The State*, 18 Ind. 416, criticised. *Eitel* v. *The State*.....201

8. *Same.—Evidence.*—If, on the trial of an indictment for desecrating the Sabbath by selling an article, there is a reasonable doubt as to whether the transaction was a sale or a gift, there can be no conviction. *Mayer* v. *The State*.....203

9. *Same.—Constitutional Law.*—That the "act for the protection of the Sabbath, and providing penalties for the desecration thereof" (2 G. & H. 481), is constitutional, must be regarded as settled. *Foltz* v. *The State*.....215

10. *Same.—Indictment.—Evidence.—Variance.*—An indictment for desecrating the Sabbath charged, that the defendant "was found unlawfully at common labor and engaged in his usual avocation, to wit, then and there selling and delivering to William Dillon one cigar and receiving from him ten cents in payment therefor," &c.

Held, that the indictment alleged, substantially, that selling cigars was the defendant's usual avocation.

Held, also, that evidence that making and selling cigars was the defendant's business was admissible.

Held, also, that proof that the sale charged was made to William *P.* Dillon, was not a material variance.....*Ibid.*

11. *Larceny.—Evidence.—Public Taking.*—In a prosecution for larceny, whether proof that the taking was done openly, in presence of the owner of the property taken, in the day time, and not by robbery, is or is not important evidence of the fact that the taking was not felonious, depends on all the circumstances of the case. *Feriter* v. *The State*.....283

12. *Instructions to Jury.—Written and Oral.*—Where, on the trial of a criminal action, the court is requested by the defendant, at the proper time, to put its instructions to the jury in writing, none of the instructions may be given orally. *Ibid.*

13. *Arraignment.—Waiver.*—Where, in a criminal action, the defendant's counsel, in the presence of the defendant, in response to an inquiry made by the court, stated that the plea would be not guilty, and thereupon proceeded to trial;

Held, that there was a waiver of formal arraignment.....*Ibid.*

14. *Keeping Gaming House.—Indictment.—Duplicity.*—An indictment charged, that at, &c., the defendant "unlawfully kept *and suffered* a certain building, room, and tenement to be used for gaming, and then and there unlawfully suffered" A. B., C. D., "and divers other persons to the grand jurors unknown, to play at a certain game commonly called billiards, for money and other articles of value."

Held, that the indictment was not bad for duplicity. *Crawford* v. *The State*.....304

15. *Same.—Evidence.*—On the trial of such an indictment for keeping a gaming house, the evidence showed that the defendant kept a billiard-room, in which players were charged a certain sum per game for the use of the tables, the loser paying such sum; and a witness testified that he had played a game and lost it, and paid the defendant for the table; that he had seen the defendant in the saloon frequently, and had seen his clerk there; that he saw games played, and that the loser always paid for the table. He could not swear positively that the defendant always knew the terms on which the games were played, but thought he had a good opportunity to know that the loser paid for the table.

Held, that this evidence sufficiently showed that the defendant had knowledge that his tables were used for gaming.....*Ibid.*

16. *Trespass.—Ice.*—Where ice val-

uable as an article of commerce, was removed without license, by cutting, from a pool formed by a dam in a stream not navigable, by a person owning the land opposite the place where the ice was cut, but the portion of the pool from which the ice was removed being over the land of another;

Held, that this was a trespass under section 14, 2 G. & H. 462, providing that any person who, without a license from competent authority, shall remove from the lands of another any tree, stone, timber, or other valuable article, shall be guilty of a trespass. *The State* v. *Pottmeyer*.....402

17. *Larceny.—Evidence.—Possession of Stolen Goods.*—The defendant in a prosecution for larceny may rebut the presumption of guilt arising from the fact that the goods were found in his possession soon after they were stolen without giving any account of the manner in which he obtained possession of them. *Clackner* v. *The State*.....412

18. *Sunday.—Work of Necessity.*—Such labor on Sunday as is a necessary incident to the accomplishment of a lawful purpose, such as the manufacture of malt beer, is not a violation of the statute for the protection of the Sabbath, 2 G. & H. 481. *Crockct* v. *The State*....416

19. *Change of Venue.—Counter Affidavits.*—Upon an application in a criminal action for a change of venue to another county on the ground of local prejudice, it is not error to receive counter affidavits. *Clem* v. *The State*.....418

20. *Juror.—Competency.—Previously Formed Opinion.*—Two of the jurors who tried an indictment had previously formed what they called "a partial opinion" of the case, from reading newspaper accounts of the facts and from rumor, and one of them had expressed that opinion, which it appeared was a mere impression, not made up from conversation with witnesses; and they thought that if sworn as jurors said opinion would have no influence upon them, and that they could act solely upon the evidence offered upon the trial; and it was evident that they had no fixed opinion upon which they rested.

Held, that they were not for this cause incompetent as jurors.....*Ibid.*

21. *Same.*—Upon a motion for a new trial of an indictment, affidavits were read to the effect that a certain juror had, before he was sworn as such, said that from all appearances he believed the defendant guilty; but one of the affidavits stated that the conversation was in a jocular manner, and did not at the time impress the affiant as being spoken sincerely; and the juror admitted by affidavit that he might have said that if what he had heard was true, he believed the defendant guilty, but nothing more.

Held, that the affidavits did not show that the juror was incompetent.*Ibid.*

22. *Same.*—Where, upon a motion for a new trial in a criminal case, an affidavit is read to the effect that a certain juror, before being sworn as such, declared his belief of the defendant's guilt, and said juror denies this under oath, the Supreme Court cannot interfere with the lower court's decision in favor of the juror of the question of veracity here involved; and where, in addition to this, other persons make oath that the general character for truth and veracity and the general moral character of the person making such affidavit are bad, a new trial should not be granted for the cause stated in such affidavit.....*Ibid.*

23. *Murder.—Instruction to Jury.—Consent.*—On the trial of an indictment for murder in the first degree, the court charged the jury, that if the defendant "was present at the time and place of the murder, in any way assisting, aiding, encouraging, or contributing towards the murder, she would be guilty as a principal in the crime. *So if the murder was perpetrated with her knowledge and consent or connivance, she is a principal.*" The jury found the defendant guilty of murder in the second degree.

Held, that the giving of the last sentence of this instruction was error, for which the defendant was entitled to a new trial.....*Ibid.*

24. *Indictment.—Receiving Stolen*

Goods.—An indictment for receiving stolen goods alleged a felonious larceny of said goods, on, &c., by certain persons named, other than defendant, and that the defendant afterwards, on, &c., "did then and there, unlawfully and feloniously, receive, conceal, and aid in concealing said goods, he then and there well knowing said goods to have been so as aforesaid unlawfully and feloniously stolen, taken and carried away," &c.

Held, that this was a sufficient allegation of a felonious intent in receiving said goods.

Held, also, that it was sufficiently alleged that the defendant knew, at the time he received the goods, that they had been stolen. *Gandolpho* v. *The State*.....439

25. *Same.*—In an indictment for receiving stolen goods, knowing them to have been stolen, it is not necessary, under our existing statute, to charge the defendant with having received the goods with intent to defraud any person.....*Ibid.*

26. *Same.—Practice.— Trial on Several Counts.*—An indictment contained three counts, the first for unlawfully, feloniously, and burglariously breaking and entering a manufactory, in the night time, and stealing certain goods therefrom; the second for larceny; and the third for receiving stolen goods, knowing them to have been stolen; it being evident from the face of the indictment that all the counts were based upon the same larceny.

Held, that the prosecuting attorney could not properly be compelled to elect upon which count he would first put the defendant on trial.*Ibid.*

27. *Disturbing Lawful Assemblage.— Statute Construed.*—In order to constitute a violation of the statute for the protection of religious meetings, &c., (Acts 1859, p. 126, and Acts 1865, Spec. Sess., p. 201) the sale, not merely of articles specifically named in the statute, but of any other articles, is sufficient, if the circumstances otherwise bring the case within the statute. *The State* v *Solomon*.....450

28. *Obtaining Money by False Pretense.— Character of Pretense.— Query*, whether a representation made by one that he is the owner of an extensive hat, cap, and fur establishment of the value of five thousand dollars, in a certain city in another state, is such a pretense as would induce a person of ordinary caution to loan the person making such representation the sum of ten dollars. *Leobold* v. *The State*...484

29. *Same.— Indictment.*— An indictment for obtaining money by false pretenses must allege to whom the money belonged.....*Ibid.*

30. *Larceny.— Mental Condition.— Use of Opium.*—On the trial of an indictment for larceny, it having appeared in evidence that the defendant was addicted to the habitual and excessive use of opium in some of its forms, and that at the time of the supposed larceny he had been deprived of his accustomed supply of the drug, he sought to prove by competent testimony what effect such deprivation would have upon his mental condition.

Held, that the evidence so offered was admissible, as tending to show whether the defendant was in such a condition mentally as to be able to commit a larceny. *Rogers* v. *The State*.....543

CUSTOM.

See LANDLORD AND TENANT.

D

DAMAGES.

See ASSAULT AND BATTERY; CASES OVERRULED, 2; MARRIAGE CONTRACT; RAILROAD, 1.

1 *Measure of.— Vendor and Purchaser.*—Where after part performance of a contract for the conveyance of real estate, by the vendee, the improvements made by him being contemplated by the contract, the vendor by his own wrongful acts puts it out of the power of the vendee to fully comply with the provisions of the contract, the measure of damages in an action by the vendee against the vendor, for such breach, is the difference between the unpaid purchase-money and the actual value of the lands at the time of the breach. *Case* v. *Wolcott*....5

2. *Contract.—Breach.*—A. contracted to saw into lumber for B., at a stipulated price per hundred feet, to be paid at certain periods, a certain number of logs to be furnished by B. at A.'s saw-mill.

Held, in a suit by A. against B. for the failure of the latter to deliver a portion of the logs as agreed, that the fact that the plaintiff sold his saw-mill after he had been notified by the defendant that the latter would pay for no more sawing and deliver no more logs, or that the plaintiff made a sub-contract with a third person to saw the logs that might be delivered, could not affect the right of recovery or the measure of damages. *Dunn et al. v. Johnson*..54

3. *Same.—Measure of Damages.*—On the breach of such an executory contract, without sufficient cause, the measure of damages is the difference between the contract price of the entire work to be done and the reasonable cost of the work, at the ordinary prices, in labor, in wear and tear of machinery, in time of use of machinery, and in value of superintendence. The profits which have been realized by a sub-contract made with a third person to do the work, or which might have been realized by such a sub-contract if made, cannot be taken as evidence of such damages. This rule applies alike to public and private contracts, on a large or small scale. *Jones* v. *Van Patten*, 3 Ind. 107, overruled.....*Ibid.*

4. *Same.—Reduction of Damages.—Burden of Proof.*—In such a case, the burden rests upon the defendant of proving, in reduction of the damages estimated by such rule, that the plaintiff could have procured other work from which profits would have accrued.....*Ibid.*

5. *Conversion.*—Where one forcibly took possession of certain wheat as it stood in the field, driving the owner away, and harvested and sold it;

Held, in an action for such taking and conversion, that the value of the wheat at the time of its sale, in the form in which it was sold, was the measure of damages, if the plaintiff was content therewith, though he was entitled to the highest price of the property at any time between the taking and the sale; and the defendant was not entitled to prove the value of his own labor in harvesting and threshing the crop, for the purpose of reducing the damages. *Ellis* v. *Wire*.....127

DECEDENTS' ESTATES.

See ANOTHER ACTION PENDING; RES ADJUDICATA.

1. *Administrator.— When chargeable with Interest.*—An administrator delayed some ten years in settling the estate, using the money of the trust in his own private speculations, and upon a reference of his accounts to a master, it did not appear that there was any reason for any unusual delay in the settlement, and the administrator refused to account to the master for the result of said speculations. The master in making his report charged interest, after the first year from the granting of the administration, on balances in the hands of the administrator.

Held, that there was no error of which the administrator could avail himself, though the master should have charged *compound* interest, making annual rests in the accounts for that purpose. *Johnson's Adm'rs* v. *Hedrick et al*.....129

2. *Same.—Suit on Bond.*—Complaint on an administrator's bond by a creditor of the intestate, assigning, first, that the administrator had wholly failed and refused to make and exhibit to the court any account of the condition of his trust; second, that he had received personal assets belonging to the estate amounting to a certain sum, which he had converted to his own use, and had failed and refused to apply the same to the use of the estate and to the payment of the debts of the estate; third, that he had failed and refused to pay the relator a certain sum, being the amount of a judgment recovered by the latter against the estate, though said administrator had had assets in his hands out of which the debt ought to have been paid.

Held, that the making of such exhibit after the commencement of this action could not cure the first breach

assigned; but the fact that the administrator had in his hands no assets which could be applied to the payment of the relator's claim was a good defense to the whole cause of action. *The State, ex rel. Lawrence*, v. *White et al*.....298

3. *Executor De Son Tort.—Pleading.* Complaint alleging that the plaintiff held a note against J. R., for fees as an attorney in a certain case pending in a certain court, said note to become due whenever such suit was decided; that judgment had been rendered in said action, and said note was due and unpaid; that subsequent to the rendition of judgment, said J. R. died, and the defendant had wrongfully and unlawfully, and with intent to cheat and defraud the plaintiff, sold certain property of the decedent, and appropriated the procceds to his own use, amounting to a large sum over and above the amount due on the note.

Held, that the complaint was sufficient to charge the defendant as an executor *de son tort*. *Ramsey* v. *Flannagan*.....305

4. *Same.—Evidence.*—In such action it appeared by the evidence that the defendant, having in his possession a horse belonging to said decedent's estate, assented to its sale, and that the money derived from the sale was applied to pay a note of the decedent on which the defendant was indorser.

Held, that the proceeds went to the defendant's benefit.....*Ibid.*

5. *Widow.—Allowance of Three Hundred Dollars.*—If the allowance of three hundred dollars which the statute (1 G. & H. 295, sec. 21) makes to a surviving wife out of the personal estate of her deceased husband, before any distribution, be not claimed during her lifetime, it goes to her personal representative. *Bratney, Adm'r*, v. *Curry, Ex'r*..399

6. *Expense of Resisting Contest of Will.*—A decedent's estate is chargeable with the reasonable expenses of the executor in an unsuccessful effort made by him in good faith to resist a contest of the will of the decedent.....*Ibid.*

DECEIT.

See PLEADING, 11: SALE, 1, 2.

DEFAULT.

Appeal.—Where a judgment has been taken against a defendant by default, on a complaint which does not state facts sufficient to constitute a cause of action, he may appeal to the Supreme Court, assigning the insufficiency of the complaint as error, without having made a motion for relief below. *Strader et al.* v. *Manville, Treasurer*.....111

DEMURRER.

See PARTIES, 3.

DEPOSITION.

1. *Certificate.—Oath.*—It is not necessary that the certificate of the officer annexed to a deposition should give the form of the oath administered to the deponent; it is sufficient if it simply states, in the language of the statute, "that the deponent was sworn according to law." *Ramsey* v. *Flannagan*.....305

2. *Suppression of.—Best Evidence.*—The fact that a deposition contains an oral statement of a fact which can properly be proved only by record, is not a good cause for the suppression of the entire deposition containing proper proof of other material facts.....*Ibid.*

3. *Leave to Take.*—The fact that a deposition has been suppressed does not render special leave of the court necessary to the taking of a new deposition of the same deponent. *Ibid.*

DESCENT.

1. *Widow.*—A., being seized in fee as tenant in common of an undivided half of certain land, died in 1856, intestate, leaving no child and no father or mother surviving him, but leaving brothers and sisters, and his wife, who afterwards married and with her husband conveyed to B. her interest in said land acquired by descent from A.

Held, in a suit against B. and the collateral heirs of A. by the grantee of the co-tenant of A., for partition, commenced in 1868, that B. was entitled to the whole of said land of which A. was seized at his death. *Sullivan* v. *McGovern et al*.....139

2. *Same.—Rights in Deceased Husband's Lands.— Mortgage.— Subsequently-Acquired Title.*—A husband and wife executed a mortgage without warranty on certain real estate to which neither had any title at the time, but afterwards the husband acquired title thereto in fee simple. Subsequently the mortgage was foreclosed on default, neither of the mortgagors appearing to the suit, and the land was sold under the decree to one not a party. Afterwards the husband died, leaving his said wife surviving.
Held, that the widow was entitled as such to one-third of said real estate. *Curren et al.* v. *Driver*.....480

DIRECTORS.

See MANUFACTURING, MINING, &c., COMPANIES.
Prison directors. *See* OFFICE AND OFFICER, 3.

DIRECTORY STATUTE.

See CASES OVERRULED, &c., 4.

DISTURBING LAWFUL ASSEMBLAGE.

See CRIMINAL LAW, 27.

DIVORCE.

Alimony.—Supreme Court.—Modification of Judgment.—A husband was granted a divorce for cruel treatment; the wife was granted the custody of a child five years of age, the only issue of the marriage, until it should be eleven years old and until further order, and an allowance of two thousand dollars for alimony. Upon the evidence, showing that the husband's treatment of the wife had been more cruel than the wife's treatment of the husband; that his real estate was worth thirty thousand dollars and his personal property thirty-six hundred dollars; that she had no separate property; that when he, a widower with five children, married her, she was a stout, healthy, young woman, but her constitution had been broken and her health enfeebled; the Supreme Court ordered the court below to so modify its decree as to allow the wife five thousand dollars in six equal semi-annual instalments, with interest, the first instalment to be paid within ten days after rendition of the judgment, and two hundred dollars annually till the child should reach the age of eleven years, for its support and education, the first payment to be made within ten days after rendition of the decree. (On petition for a rehearing, the members of the Supreme Court having been changed in the meantime, they were equally divided upon the question of the power of this court in such a case as this, to direct what judgment shall be entered by the court below.) *Hyatt* v. *Hyatt*...309

DRAINING ASSOCIATION.

See CASES OVERRULED, &c., 1.

1. *Assessment.*—Suit by a ditching association, to enforce a lien for benefits assessed to the defendant's land, the assessment on which the suit was founded commencing thus: "A schedule of lands and assessments of *benefits* to same caused by the construction of the ditch contemplated to be constructed by," &c. Appended to the assessment was an affidavit of the appraisers, that the "foregoing is a true and correct assessment of wet lands," &c.
Held, that this sufficiently appeared to be an assessment of *benefits*.—*The Jordan Ditching and Draining Association* v. *Wagoner*.....50
2. *Same.—Description of Land.*—The description of the defendant's land in said assessment was by abbreviations and figures, as follows: "Matthias Wagoner S. E. ¼ of N. W. ¼ Sec. 18, T. 21, N. R. 7 E., 40 acres."
Held, that this was a sufficient description.....*Ibid.*
3. *Same. — Complaint. — Description of Drain.*—In such an action the complaint need not contain the articles of association or allege their substance; nor is it necessary for the complaint or assessment to describe the ditch in any manner..*Ibid.*
4. *Same.—Description of Land.*—Suit by a ditching association to enforce an assessment upon land, described in the complaint as the "south half of the south-east *quarter* of section

twenty-seven, in township twenty-one, north, in range six east, in the county of Madison." The assessment on which the suit was brought described the land thus: "S. ½ S. E. Sec. 27. T. 21. R. 6, E., *twenty* acres."

Held, on demurrer, that the description in the assessment was sufficient. *The Etchison Ditching Association* v. *Jarrell*.....131

5. *Same.—Report of Appraisers.*—The report of the appraisers set out in a complaint to enforce an assessment on land under the ditching law did not state whether the assessment made by them was of benefits or injuries.

Held, that this omission rendered the complaint bad on demurrer.....*Ibid.*

6. *Same.—Pleading.*—In a suit to enforce an assessment on lands under the ditching law, the exhibit annexed to the complaint, and referred to therein as the appraisers' schedule of assessment, consisted merely of a number of columns containing separately the name of the defendant, the description of each tract of land, the value per acre of each tract, and the total assessment on each tract, the columns being headed "Name of Owner," "Description," &c., and the amount of the last column being placed at its foot.

Held, that the exhibit was insufficient, and rendered the complaint bad on demurrer. *Thompson* v. *The Honey Creek Draining Co*.....268

7. *Articles of Association.—Statement of Purposes.—Statute Construed.*—In the articles of association of a draining company, organized under the act of 1869 (Acts 1869, Spec. Sess. p. 82), it was stated, that, "the object of the association shall be to drain and reclaim the wet and overflowed lands lying along and contiguous to the valley of the Calumet river, commonly known as the Little Calumet, in the northern portions of Lake and Porter counties, in the State of Indiana, by digging, if deemed expedient, a new channel and outlet for the waters of said valley, or a portion thereof, and by digging, excavating, and constructing such other ditches and channels as may seem best adapted to drain, improve, and reclaim said lands."

Held, in a suit by an owner of lands liable to be beneficially affected by the proposed drain, to enjoin said company from proceeding to assess and make a charge upon said lands the amount of benefit they would receive from the construction of said drain, that, viewed in the light of the evidence, this was so distinct a statement of the purposes intended to be accomplished, that all whose lands were liable to be affected by the proposed drain might know the fact therefrom, and therefore fulfilled the requirement of the statute in that regard. *Seyberger* v. *The Calumet Draining Co*.....330

E

ELECTION.

Contest of. See APPEAL, 2, 3, 6; OFFICE AND OFFICER, 2.

EMINENT DOMAIN.

See CITY, 6; HIGHWAY, 1.

ESCAPE.

Liability of Sheriff.—Bastardy.—Where judgment is rendered against the defendant in a prosecution for bastardy, and he is committed to jail for failure to pay or replevy said judgment, and the sheriff permits him to escape without paying or replevying the same, the sheriff is liable for the full amount of said judgment, nothwithstanding the insolvency of said defendant. *The State, ex rel. Billman*, v. *Hamilton*.....502

ESTOPPEL.

See PROMISSORY NOTE, 1; TURNPIKE, 15.

EVANSVILLE.

Charter.— Salaries of Officers.— The charter of the city of Evansville provides, that the mayor "shall receive annually a salary, to be fixed by ordinance or by-law, and paid out of the city treasury by quarter-yearly instalments; and after the

first ordinance fixing such salary shall take effect and be in force, no ordinance decreasing such salary shall take effect until the next regular election for mayor, or until the office of mayor shall become vacant." The record of the proceedings of the common council shows that, at a certain date, "on motion, the council proceeded to fix the following salaries, viz.: for" A. B., "mayor, per annum, three thousand dollars;" and A. B. was paid that amount while he remained mayor. After the election and qualification of his successor, the latter was also paid the same sum for a portion of his term of office, when the common council passed an ordinance which provided, "that there shall be allowed to the several officers of the city and appointees of the common council of the city, hereinafter mentioned, the following salaries, to be paid monthly: to the mayor per year, two thousand dollars," &c.

Held, that said allowance of three thousand dollars was a fixing by by-law of the salary of mayor, and not simply an allowance to A. B.

Held, also, that the ordinance so passed after the election and qualification of the successor of A. B., decreasing the salary of mayor, could not have any effect on the salary of said successor. *Walker* v. *The City of Evansville*.....393

EVIDENCE.

See BASTARDY, 1; CRIMINAL LAW, 2, 8, 10, 11, 15, 30; DAMAGES, 4; DECEDENTS' ESTATES, 4; DEPOSITION; INJUNCTION, 8; LIQUOR LAW, 2, 5; PRACTICE, 1; SLANDER, 4, 5; SUPREME COURT, 1, 2, 3, 5.

See SHAW *v.* SPENCER, 143.

1. *Promissory Note.—Attorney's Fees.* On the trial of an action on a promissory note which provided for the payment of "all costs and attorney's fees for collection," if the note should not be paid at maturity, the only evidence introduced was the note sued on.

Held, that there could be no finding for attorney's fees. *Bowser et al.* v. *Palmer*.....124

2. *General Denial.*—In an action to recover for goods alleged to have been sold and delivered to the defendant, he may show under an answer of general denial, that they were sold and delivered to his wife under such circumstances as not to bind him. *Day* v. *Wamsley*.....145

3. *Opinion of Witness.*—Where the value of property, real or personal, comes in question, a witness who has a personal knowledge of the property and who possesses the necessary information to enable him to form a proper estimate of its value, will be permitted to give his opinion in reference to such value. *Ferguson* v. *Stafford et al*.....162

4. *Same.—Waste.*—On the trial of an action for waste against one holding under a will till the youngest of the plaintiffs should come of age, a witness having testified that he knew the premises, a farm, its improvements and condition, when the defendant took possession, and also its condition at the commencement of the suit, and having described its condition at each of these periods;

Held, that there was no error in permitting said witness, over the defendant's objection, to give his opinion as to the value of the farm at the time the action was commenced, and also what it would then have been worth if kept in ordinarily good repair and cultivated in a husband-like manner, or in permitting him to give his opinion as to the cost, in detail, of putting the farm in good condition and repair.....*Ibid.*

5. *Same.—Replevin.*—On the trial of an action of replevin, a witness was permitted, over the defendant's objection, to give his opinion as to the amount of damages suffered by the plaintiff by reason of the detention of the property by the defendant, without stating any facts upon which he based such opinion.

Held, that this was error. *Kirkpatrick* v. *Snyder et al*.....163

6. *Same.—Age.*—On the trial of an indictment for desecrating the Sabbath, a witness stated, as his owr opinion merely, that the defendan was over fourteen years of age, and testified that the defendant was keeping house, living with a woman as his wife, whom the witness sup-

posed to be the defendant's wife; that they lived together as husband and wife; and that the defendant had a mustache.

Held, that this evidence was sufficient to justify a finding that the defendant was at least fourteen years of age. *Foltz* v. *The State*.....215

7. *Cross-Examination.—Alteration of Written Instrument.*—On the trial of an action on a promissory note given for a quantity of barley sold by the payee to the maker, where the question at issue was, whether the note was executed for the sum specified therein or was made for a sum one hundred dollars less and altered by the payee to the greater sum, the maker, called as a witness by the plaintiff, testified that the signature was his, but, over the plaintiff's objection, further testified that the note had been so altered by the payee after its execution; that the maker could not read English writing; that the note was written by the payee and by him read to the maker as for the smaller sum; whereupon, the payee on his own behalf testified that the sum of one hundred dollars was to be paid in cash on the barley; that when he was writing the note, the maker said he could not then pay the one hundred dollars, whereupon he wrote the note for the larger sum. On cross-examination, the payee was asked, whether, when he wrote the note, and before it was signed, he stated to the maker that it was for the smaller sum, and whether he did not so read the note to the maker, which question being objected to as not proper cross-examination, the court refused to permit it to be answered.

Held, that such refusal was error. *Schneider* v. *Rapp*.....270

8. *Order of Proof.*—It is discretionary with the court to admit or exclude original evidence offered by a plaintiff, the defendant objecting, after the defendant's evidence is closed. *The State, ex rel. Middle T'p*, v. *Parker et al*.....285

9. *Declaration of Agent or Servant.*—In an action against a railroad company by an administrator, to recover damages for the death of his decedent occasioned by the collision of a locomotive and train of cars and a wagon in which said decedent was crossing the track of the defendant upon a public highway;

Held, that the declarations of a fireman employed on the locomotive at the time of the collision, made upon the arrival of said train, bearing the body of the deceased, at a station one mile from the place of the accident, the train having been stopped at the scene of the accident, and the body having been placed upon it and carried thereon to said station, that the train was running between forty and sixty miles an hour; that he could not tell any difference between the signal and the collision; that the deceased was sitting with his back toward the train; that he did not think the deceased saw or heard the train or knew there was any train in reach of him; that the deceased never moved out of his position till he was struck; that there was no signal, were not admissible in evidence as part of the *res gestæ*. *The Bellefontaine R. W. Co.* v. *Hunter, Adm'r*.....335

10. *Presumption as to Improper Evidence.*—Where error has occurred in the admission of improper evidence material to the issue, it will be presumed that it worked injury, unless the contrary affirmatively appear; and the action of the court in overruling a motion for a new trial assigning such error for cause is not presumptive evidence that the error worked no injury.....*Ibid.*

11. *Witness.—Impeachment.—Rebutting Evidence for Defendant in Criminal Action.*—After the defendant in a criminal action had closed his evidence, the State called a witness who testified that the general character of a certain witness who had given material testimony for the defendant, by whom he had been introduced, was bad.

Held, that after the State had closed her rebutting testimony, the defendant was entitled to introduce another competent witness to testify that he was acquainted with the general character of said former witness, which had been so attacked, and that it was good. *Clackner* v. *The State*.....412

12. *Larceny.—Possession of Stolen*

Goods.—The defendant in a prosecution for larceny may rebut the presumption of guilt arising from the fact that the goods were found in his possession soon after they were stolen without giving any account of the manner in which he obtained possession of them.... *Ibid.*

13. *Witness.—Impeachment.*—Where a witness has been impeached by proof of statements made by him contradictory of the facts to which he has testified, the party who produced such witness may introduce evidence of his general good character. *Clem* v. *The State*.....418

14. *Abatement.—Pleading.—Action to Quiet Title.*—In an action to quiet title to real estate, matter in abatement cannot be given in evidence without having been specially pleaded. *Wilson* v. *Poole*.....443

15. *Construction of Written Instrument.*—A street contractor was permitted, over objection, to testify that his written bid to grade a certain street for one dollar a foot, which was in evidence, meant that he thereby proposed to do the work for fifty cents per front foot of the property on each side of the street. *Held*, that this was error; but as the proper legal construction of the writing was the same as the construction given by the witness, the error was harmless..... .....*Ibid.*

16. *Objection to.—Bill of Exceptions.* An exception to the admission of evidence cannot be made available where it is not shown by a bill of exceptions what the ground of objection was. *Robinson* v. *Murphy*.482

17. *Covenant Against Incumbrances. Breach of.—Taxes.*—On the trial of an action for breach of the covenant against incumbrances in a warranty deed, to recover an amount which the grantee has been compelled to pay as taxes constituting a prior incumbrance, there must be proper evidence of the listing and appraisement of the property, and of the action of the proper authorities in fixing the rate of taxation, where it is not fixed by law.....*Ibid.*

18. *Record.— Certificate.*— A transcript of certain proceedings before a board of county commissioners was offered in evidence, the certificate of the auditor attached to which did not state that it was a full, true, and complete transcript of the record, but stated merely that it was "*truly copied* from the records," &c. *Held*, that the certificate was defective, and that the transcript was not admissible in evidence. *Weston* v. *Lumley*.....486

EXECUTION.

See EXEMPTION; PARTNERSHIP, 4; PRINCIPAL AND SURETY, 2.

1. *Sheriff.—Levy.*—A sheriff, holding an execution for five hundred and fifty dollars against the property generally of two persons, levied it in good faith on certain real estate worth over sixteen hundred dollars, there being an incumbrance of one hundred dollars thereon, the title in fee to an undivided one-half thereof being in one of the execution-defendants, and the equitable title to the other half being in him also, it being held in trust for him. There had been a sale of the land for taxes, but the sale was irregular and void, and there was no reasonable doubt concerning the title. When first called on, the execution-defendants did not designate any property to be levied upon, but before a levy was made they designated this real estate, they having at the time, subject to execution, also other real estate worth ten thousand dollars, and a large amount of personal property, upon which latter the plaintiff had directed the sheriff to levy. The sheriff failed to sell the land for want of bidders. *Held*, that the sheriff and his sureties were not liable to suit on his official bond, for failing to levy on the personal property as directed. *The State, ex rel. Farnham*, v. *Willis et al*.....118

2. *Motion for After Ten Years.—Assignment of Error.*—A proceeding to obtain leave of court to issue an execution on a judgment after the lapse of ten years from the entry thereof is a simple motion, to be heard by the court in a summary way, the only question being whether the judgment or any part thereof remains unsatisfied and due. No pleadings are required or contem-

plated by the statute, and the action of the court in striking out pleadings filed cannot be the basis of an assignment of error in the Supreme Court. If the judgment-defendant has any equities, or cross action, he must resort to his remedy by suit. *Plough* v. *Reeves et al*.....181

3. *Same.*—In a proceeding to obtain execution upon a judgment of more than ten years standing, no pleadings are contemplated by the statute, and the action of the court in rejecting answers filed in response to such a motion cannot be assigned in the Supreme Court as error. *Plough* v. *Williams et al*.....182

EXECUTOR.

See DECEDENTS' ESTATES.

EXECUTOR DE SON TORT.

See DECEDENTS' ESTATES, 3, 4.

EXEMPTION.

Wife.—Where husband and wife are living together, and the property of the husband is not of the value of three hundred dollars, and the wife is the owner of property levied upon under an execution, and is the real debtor in the judgment and execution, she may claim exemption under the statute, 2 G. & H. 367, of her said property to the extent necessary to make with her husband's property the amount of three hundred dollars protected by the statute. *Crane* v. *Waggoner et ux*.....83

F

FALSE PRETENSE.

See CRIMINAL LAW, 1, 2, 28, 29.

FENCES.

See RAILROAD, 3, 4; TRESPASSING ANIMALS.

FIRE INSURANCE.

See INSURANCE.

FORBEARANCE.

See PROMISSORY NOTE, 2.

FORFEITURE.

See VENDOR AND PURCHASER, 2.

FRAUD.

See INSURANCE, 4, 5; MARRIAGE CONTRACT; PLEADING, 3, 7; SALE, 1, 2, 3; TRUST, 4.

1. *Contract.—Rescission in Part.*—A. sold to B. a farm, valued in the transaction at $6,300, in part payment for which he took from B. certain western lands at $1,300, upon false and fraudulent representations of B. as to their location, character, and value per acre. Pending the transaction, B. agreed with C. to exchange said farm for another owned by C.; and, at B.'s request, A. conveyed his said farm directly to C., who continued in possession thereof. Upon discovering the fraud, A. tendered to B. a conveyance of the western lands and demanded from him $1,300.

Held, in a suit by A. demanding a recission of the contract so far as the western lands were concerned and judgment for $1,300, that he was not entitled to such rescission. *Johnson et al.* v. *Cookerly*.....151

2. *Fraudulent Sale.— Creditors*— To render a sale for a valuable consideration void for fraud as against the creditors of the vendor, the vendee must have had notice of the intended fraud. *McCormick* v. *Hyatt*.546

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCE.

See FRAUD, 2; TRUST, 4.

G

GAMING HOUSE.

See CRIMINAL LAW, 14, 15.

GARNISHMENT.

See SCOTT *v.* GREEN, 192.

GRAND JURY.

See CRIMINAL CIRCUIT COURT, 2, 5, 6, 11, 12.

GRAVEL ROAD.

See TURNPIKE.

GUARANTY.

Notice.— Lease.— It was stipulated in a lease for two years, that the lessee should pay the lessor rent, in a certain sum for the entire period, in two equal payments, for which the lessee agreed to give his notes with surety to the satisfaction of the lessor. Certain third persons executed an agreement annexed to the lease, as follows: "We guarantee that" the lessee "shall perform his agreements in the foregoing contract." The lessee took possession, and failed to execute such notes or pay the sum due, of which notice was given to the guarantors ten months after the commencement of the lease.

Held, that the guarantors were not released from their liability as such as to the payment of the money, by the neglect of the lessor to notify them at an earlier date of the failure of the lessee to give the notes. *Leonard et al.* v. *Shirts* 214

GUARDIAN AND WARD.

See INSANE PERSON; JURISDICTION.

H

HEIRS.

See PARTIES, 1.

HIGHWAY.

Entering of Record. See SLANDER, 4, 5.

1. *Neighborhood Road.*—A neighborhood road is not a private road, and the question whether the right of eminent domain may be exercised to take land for a private road is not applicable to it. *Kissinger* v. *Hanselman*.....80
2. *Location of.—Record.*—The record of the board of county commissioners in a proceeding to locate a highway need not contain the evidence by which it was proved that the proper notice had been given of the intention to present the petition for the highway;—it is enough if the record shows that the fact was proved, without showing how it was proved .....*Ibid.*

HUSBAND AND WIFE.

See EVIDENCE, 2; STATUTE OF FRAUDS, 2.

1. *Parties.—Insane Person.—Motion in Arrest.*—An insane person can properly appear as a defendant, only by guardian or committee; but where in a suit against a husband and wife to foreclose a mortgage executed by the defendants, the husband at the time of the suit being insane, the wife appeared and answered in her own right and on behalf of her husband, and the plaintiff, without objecting to the right of the wife to appear and defend for the husband, took issue on such answer and voluntarily went to trial thereon;

Held, that the plaintiff could not raise such objection by motion in arrest of judgment. *Yount* v. *Turnpaugh et ux*.....46
2. *Judgment.—Clerical Error.—Supreme Court.*—The judgment in such case directed the recovery of a certain sum by the *defendants*, when it should, in that respect, have been rendered for the husband alone; but no objection was made to the judgment in the lower court.

Held, that the objection could not be raised in the Supreme Court....*Ibid.*
3. *Exemption.— Wife.*—Where husband and wife are living together, and the property of the husband is not of the value of three hundred dollars, and the wife is the owner of property levied upon under an execution, and is the real debtor in the judgment and execution, she may claim exemption under the statute, 2 G. & H. 367, of her said property to the extent necessary to make with her husband's property the amount of three hundred dollars protected by the statute. *Crane* v. *Waggoner et ux*.....83
4. *Witness.—Slander.*—In an action against husband and wife for slanderous words spoken by the wife;

Held, that the wife was a competent witness in her own behalf.

Held, also (ELLIOTT, J., dissenting), that the husband was a competent witness for himself. *Mousler et ux.* v. *Harding*.....176

5. *Parties.—Suit by Wife.*—In an action by a married woman concerning her separate property, the husband not himself joining in the complaint, in which the plaintiff alleged that she was a married woman, and therefore *she* joined her husband as a party plaintiff;

Held, that there was no error in the fact that nothing was said as to the husband in the verdict or judgment; nor, it seems, would this have been error had the husband been made a party plaintiff properly, by himself joining in the complaint. *McCormick* v. *Hyatt*.....546

I

ICE.

See CRIMINAL LAW, 16; RIPARIAN OWNER.

IGNORANCE OF LAW.

See INSURANCE, 3.

INCUMBRANCES.

See EVIDENCE, 17; PARTIES, 1.

INDEMNITY.

See PRINCIPAL AND SURETY, 4.

INDICTMENT.

See CRIMINAL CIRCUIT COURT, 4; CRIMINAL LAW.

INFORMATION.

See CRIMINAL LAW, 3; TURNPIKE, 3, 4, 5, 7.

INJUNCTION.

See CITY, 5, 6; TAX, 7; TRUST, 5; TURNPIKE, 11, 12, 13, 14.

1. *New Trial as of Right.*—A judgment was rendered for the possession of real estate, and the defendant, having paid the costs, filed a complaint as a motion for a new trial as of right, under the statute, and prayed an injunction to restrain the further prosecution of the judgment; and the judge, in vacation, having overruled a demurrer to the complaint, granted a temporary injunction. The complaint did not give any description of the premises, was not verified by affidavit, and it did not appear therefrom that a writ of possession had been issued, or that any order or direction had been given therefor, or that the judgment-plaintiff was using any means to obtain possession.

Held, that the granting of the injunction was error. *Ross et al.* v. *Crews et al*.....120

2. *Justice of the Peace.—Appeal.*—An injunction will not lie to restrain proceedings on a judgment rendered by a justice of the peace, where the party seeking the injunction has had an opportunity to take an appeal from the judgment, and full relief could have been obtained on such appeal; or where, by an application to the circuit court or court of common pleas, an appeal may be authorized after the lapse of the time limited therefor, under section 68, 2. G. & H. 597. *Baragree* v. *Cronkhite et al*.....192

3. *Attachment*—An injuction will not lie in favor of the defendant in attachment to restrain proceedings on a judgment rendered against him therein, where a part of the indebtedness for which the judgment was rendered is admitted to be due, and no offer is made to pay such portion..... *Ibid.*

4. *City.—Street Improvement.*—The common council of a city by ordinance changed the grade of a street, bordering upon which was a valuable mill property, in front of which the street was cut down, in making said change, about twenty-one inches, so that about twenty-five dollars would be the expense of restoring as convenient access to the mill yard as existed before the change. Suit by the owner of said mill property to enjoin the completion of the work, the complaint being filed after the street had been so cut down and when, in order to complete the work, it only remained to put on

the gravel, said owner's damages occasioned by the change not having been assessed or tendered to him.

Held, that there was no ground for an injunction. *City of Columbus et al.* v. *Storey et al*..... 195

5. *Restraining Order.—Judge of Common Pleas.*—The judge of the common pleas court may grant a restraining order in vacation, without notice, upon emergency, in a cause pending in the circuit court. *City of Columbus* v. *The Hydraulic Woollen Mills Co*.....435

6. *Same.*—Such order may only be granted until notice can be given and a hearing had thereon; and where such an order was granted, to expire on the second day of the next term of the circuit court, which would be a period of six months;

Held, that the period was too long. *Ibid.*

7. *Notice.— Waiver.*—Where the defendant in an application for a temporary injunction appeared by himself and attorney, and made no objection for want of notice;

Held, that any defect for want of notice was cured. *Hardy* v. *Donellan* 501

8. *Evidence.*—A temporary injunction may be granted without any other evidence than the complaint and affidavit of the plaintiff.... *Ibid.*

INSANE PERSON.

Appearance.—Motion in Arrest.—An insane person can properly appear as a defendant, only by guardian or committee; but where in a suit against a husband and wife to foreclose a mortgage executed by the defendants, the husband at the time of the suit being insane, the wife appeared and answered in her own right and on behalf of her husband, and the plaintiff, without objecting to the right of the wife to appear and defend for the husband, took issue on such answer and voluntarily went to trial thereon;

Held, that the plaintiff could not raise such objection by motion in arrest of judgment. *Yount* v. *Turnpaugh et ux*.....46

INSANITY.

See CRIMINAL LAW, 30.

INSTRUCTIONS TO JURY.

See CRIMINAL LAW, 23; MARRIAGE CONTRACT.

Written and oral. *See* CRIMINAL LAW, 12.

Harmless Error.—An instruction to the jury on the trial of a criminal action, by which the defendant was not injured, cannot be urged by him as error on appeal. *Watts* v. *The State*.....237

INSURANCE.

1. *Mutual Fire Insurance Company.—Receiver.—Pleading.*—In a suit by a receiver of a mutual fire insurance company, organized under the laws of this State, to recover an assessment on a premium note executed to said company by the defendant, it is not necessary that the complaint should be accompanied by a transcript of the decree appointing the plaintiff receiver of the company and making the assessment sued for. *Boland* v. *Whitman Receiver, &c*.....64

2. *Same.—Rescission of Contract of Insurance.*—By agreement between a mutual fire insurance company, acting through its board of directors or an agent duly authorized by them, and the insured, a contract of insurance may be rescinded by the surrender of the policy before the expiration of the time for which it was issued and the release of the insured from further obligation on his premium note.....*Ibid.*

3. *Same.—Suit on Premium Note.—Ignorance of Law.*—The fact that assessments upon a premium note executed to a mutual fire insurance company have been made more frequently and in greater amounts than the agent of the company, at the time of the execution of the note, represented they would be to the insured, who confided in such representations and was induced thereby to enter into the contract and execute the note, cannot constitute a defense to a suit on such note..*Ibid.*

4. *Same.—Fraudulent Representations as to Solvency.*—If at the time of the making of the contract of insurance, the agent, by the authority of the

directors, represents that the company is entirely solvent and able to pay all losses, and is then worth a certain considerable amount, and the insured relies on such representations and is induced thereby to enter into said contract and execute the premium note, and said representations are false, these facts will constitute a good defense to a suit on said premium note.....*Ibid.*

5. *Same.— Pleading.— Fraud.*— Suit by the receiver of a mutual fire insurance company on a premium note. Answer, that the officers of said company entered into a fraudulent combination with A. and B. and procured the institution by A. and B. of the suit against said company, in which said receiver was appointed and the assessment sucd for in this action was made, and by fraud, collusion, improper admissions, and false testimony, procured the decree, assessment, and appointment of the plaintiff in this action as receiver.

Held, that if the defendant could in this collateral manner impeach said decree for fraud, still the answer was bad for failing to allege any material facts constituting fraud. *Ibid.*

6. *Same.— Change of Ownership of Insured Property.*—Where property insured by a mutual fire insurance company is sold and conveyed by the insured, he is not liable to be assessed on his premium note for losses occurring after such sale and conveyance.....*Ibid.*

7. *Foreign Insurance Company.*—An answer to a suit by an insurance company on a promissory note executed to such company in consideration of a policy of insurance issued by it, alleging that the plaintiff is a foreign insurance company, and that the contract of insurance was entered into in this State through an agent resident therein, but not also showing a non-complance with the requirements of the act of December 21st, 1865, regulating foreign insurance companies, &c., is bad on demurrer. *Black* v. *The Enterprise Ins. Co*.....223

INTEREST.

Remedy.—Act of 1867.—A promissory note containing a stipulation for interest at the rate of ten per cent. per annum was executed when the law prohibited a recovery of interest exceeding six per cent. per annum; and suit was brought thereon under the interest law of 1867, authorizing such contracts.

Held, that the contract, as to interest, was governed by said law of 1867. *Pattison et al.* v. *Jenkins*.....87

J

JUDGE.

See CASES OVERRULED, &c., 7; CRIMINAL CIRCUIT COURT, 9; INJUNCTION, 5, 6; VENUE, 2.

1. *Appointment of.— Criminal Court.* On the trial of an indictment in a criminal circuit court, the judge of that court having been of counsel in the cause, the judge of the court of common pleas presided, his appointment being shown only by the record made *after* he took the bench.

Held, that the defendant could not, in the Supreme Court for the first time, raise the question of the power of the judge who presided, no want of power being shown by the record. *Watts* v. *The State*.....237

2. *Same.— Court of Common Pleas.*— Where the judge who tries a cause in the court of common pleas has been called to the bench by special appointment of the judge of said court, and no objection is made to him in said court, an objection to him cannot be raised in the Supreme Court. *Hyatt* v. *Hyatt*...309

3. *Same.— Jurisdiction.*— In a civil action in the circuit court, the court having jurisdiction of the subject-matter and the parties, a change of venue was taken from the regular judge of said court, and he called another judge to try the cause, who appeared and made some orders, and, by consent of the parties, continued the cause till the next regular term of said court. At the next term, the appointed judge did not appear, and the regular judge set down the cause for trial on a subsequent day of that term before another judge, who tried the cause without objection from either party.

Held, that the judge who tried the cause had jurisdiction of the subject-matter and of the parties. *McCormick* v. *Hyatt*.....546

JUDGMENT.

See DIVORCE.

Form of. *See* HUSBAND AND WIFE, 5; REPLEVIN, 1.

1. *Clerical Error.—Supreme Court.* The judgment in a suit against a husband and wife to foreclose a mortgage executed by the defendants directed the recovery of a certain sum by the *defendants*, when it should, in that respect, have been rendered for the husband alone; but no objection was made to the judgment in the lower court.

Held, that the objection could not be raised in the Supreme Court. *Yount* v. *Turnpaugh et ux*.....46

2. *Form of.—Supreme Court.*—A question as to the form of a judgment cannot be made in the Supreme Court if not saved by objection and exception below. *Kissinger* v. *Hanselman* 80

3. *Collateral Proceeding.—Jurisdiction.*—Where a judgment is rendered by a court of superior jurisdiction, having jurisdiction of the subject-matter, and having acquired jurisdiction of the parties, which, in the absence of a contrary showing, it will, in a collateral proceeding, be presumed to have done, such judgment, though rendered for the plaintiff upon an unsufficient complaint, is binding upon a party thereto and conclusive of his rights therein adjudicated, until reversed or otherwise set aside as to him. *Abdil* v. *Abdil*..... 460

4. *Same.—Withdrawal of Appearance.—Recovery of Real Estate.*—A judgment of the circuit court against a defendant in an action commenced before a justice of the peace on a complaint to recover possession of land for non-payment of rent, rendered after said defendant, having filed an answer denying the relation of landlord and tenant and claiming title to an estate for life in the premises in himself, withdrew his appearance, cannot bar a subsequent action by said judgment-defendant as owner of said life estate to recover possession of the land from the judgment-plaintiff in said former action.....*Ibid.*

JUDICIAL DISCRETION.

See EVIDENCE, 8.

JUDICIAL NOTICE.

See LIQUOR LAW, 4.

JURISDICTION.

See CRIMINAL CIRCUIT COURT, 3; CRIMINAL LAW, 6; JUDGE; JUDGMENT, 3; SLANDER, 5; TURNPIKE, 7, 16.

Circuit Court.—The circuit court has not jurisdiction to review the record and judgment of the court of common pleas in a proceeding upon an application of a guardian to sell real estate, for the purpose of correcting a misdescription of the premises intended to be sold. *Coleman* v. *Barnes*.....93

JUROR.

See CRIMINAL LAW, 20, 21, 22.

JURY.

See INSTRUCTION TO JURY.

How Impanelled.—In the criminal circuit court, a jury of bystanders was called, by order of the court, to try an indictment, there being thereon none of the jurors of the regular panel, they being engaged in deliberation upon another cause, which had been submitted to them. The defendant in said indictment objected to be tried by the jury thus called, and demanded to be tried by the regular panel, but his objection was overruled.

Held, that this was error. *Rogers* v. *The State*.....543

JUSTICE OF THE PEACE.

See APPEAL, 4; INJUNCTION, 2.

Pleading. *See* TRESPASSING ANIMALS, 2.

L

LANDLORD AND TENANT.

Repairs.— Custom.— Where a lease contains no covenant on the part of the lessor to repair, he is not bound to do so; and if the lessee makes repairs, he cannot charge the lessor with the cost thereof. Nor can a custom in the locality in which the premises are situated, or in the State, contrary to this rule, be set up by the lessee. *Biddle* v. *Reed*.....529

LARCENY.

See CRIMINAL LAW, 11, 17, 26, 30.

LEASE.

See GUARANTY, 1; LANDLORD AND TENANT.

LEVY.

See EXECUTION, 1; PARTNERSHIP, 4.

LICENSE.

See LIQUOR LAW; TOWN; TURNPIKE, 8, 9.

LIEN.

See VENDOR AND PURCHASER, 1.

LIMITATIONS, STATUTE OF.

See TRUST, 4.

LIQUOR LAW.

See APPEAL, 4.

1. *Change of Venue.*—Where an appeal has been duly taken to the circuit court or court of common pleas from the decision of the board of county commissioners upon an application for license to retail intoxicating liquors resisted by remonstrance, such proceeding is a "civil action," and a change of venue may be taken as in other civil actions; the judgment of the court to which the venue is changed is final and without appeal therefrom; and a license duly granted thereunder to the petitioner will protect him against the penalty for retailing without license. *The State* v. *Vierling*.....99

2. *Evidence.—Beer.*—On the trial of an indictment for selling intoxicating liquor to a minor, the evidence showed that the liquor sold was beer, but failed to show that it was malt beer, or that it was an intoxicating liquor.

Held, that this failure rendered the evidence insufficient. *Weis* v. *The State*.....204

3. *License.*—A license to sell intoxicating liquors in a less quantity than a quart at a time, or to sell intoxicating liquors to be drunk in the vender's house, out-house, &c., cannot be made to take effect before the date at which it is issued. *Wiles* v. *The State*.....206

4. *Judicial Notice.—Ale.*—A court judicially recognizes the fact that ale is a malt liquor.....*Ibid.*

5. *Evidence.— Venue.—Time.*—A person was tried and convicted in Jefferson county, in this State, in January, on an inditment found in said county in the same month, for retailing, in that county, intoxicating liquor without a license. The prosecuting witness testified (as shown by a bill of exceptions), that he bought the liquor of the defendant, "at his place of business in North Madison, in said county, during the week between Christmas and New-Year's."

Held, that it sufficiently appeared that the sale was made within two years before the finding of the indictment, and that it occurred in Jefferson county in this State. *Jackson* v. *The State*, 19 Ind. 312 disapproved..*Ibid.*

6. *License.—Change of Venue.—Appeal.*—Where an appeal has been taken to the circuit court or court of common pleas from the decision of the board of county commissioners in a proceeding to obtain a license under the temperance act of 1859, resisted by remonstrance, a change of venue may be granted, as in other "civil actions." No appeal lies to the Supreme Court from the judgment of the court to which such change is taken. *Blair et al.* v. *Vierling*.....269

7. *Minor.*—It is not a good defense to an indictment for selling intoxicating liquor to a person under the age of twenty-one years, that the father of the infant authorized the

defendant to make the sale to the minor. *The State* v. *Clottu*.....409

LOCAL LAWS.

See COURT, 2.

M

MALICE.

See SLANDER.

MANDATE.

See CITY, 3.

MANUFACTURING, MINING, &c., COMPANIES.

Directors.—Statute Construed.—Directors of an incorporated manufacturing company are officers, within the meaning of the fifteenth section of the act providing for the incorpration of such companies, 1 G. & H. 427. *Gaff et al.* v. *Theiss*.....307

MARRIAGE CONTRACT.

Breach of.—Instruction to Jury.—On the trial of an action for breach of a marriage contract, where the evidence did not tend to show any fraud in the making of the contract or in its violation, the court instructed the jury as follows: "If the marriage contract and its breach by the defendant have been proved to your satisfaction in this case, and if you further believe from the evidence in the case that the element of fraud mingles in this controversy, as an ingredient in the act of the defendant, either in making the marriage contract with the plaintiff or in violating or breaking that contract, then you may award the plaintiff, in addition to the actual loss sustained by her, such exemplary damages as shall tend to prevent a repetition of the injury, and to punish the defendant." *Held*, that though the instruction stated a correct principle of law, yet, under the evidence, it was erroneous. *Dryden* v. *Knowles*.....148

MASTER AND SERVANT.

Declarations of Servant. *See* EVIDENCE, 9.

MEASURE OF DAMAGES.

See DAMAGES.

MENTAL CONDITION.

See CRIMINAL LAW, 30.

MINOR.

See EVIDENCE, 6; PARENT AND CHILD, 1, 2.

MISDEMEANOR.

See CRIMINAL CIRCUIT COURT, 3, 4.

MORTGAGE.

See DESCENT, 2; HUSBAND AND WIFE, 1; PARTNERSHIP, 1.

MURDER.

See CRIMINAL LAW, 23.

N

NAME.

See PROCESS, 1.

NATIONAL BANK.

See TAX, 1 to 8.

NEGLIGENCE.

See EVIDENCE, 9; RAILROAD, 2.

NEW TRIAL.

See ASSIGNMENT OF ERROR, 1.

As of right. *See* INJUNCTION, 1.

Motion. *See* BILL OF EXCEPTIONS, 3; REPLEVIN, 1.

NOTICE.

See CONTRACT, 4; GUARANTY; INJUNCTION, 5, 6, 7; PRINCIPAL AND AGENT, 1; VENDOR AND PURCHASER, 1, 2.

NOVATION.

1. In consideration of the oral agreement of A. to convey certain real estate to B., the latter executed his note to C., for a certain sum due from A. to C. who received said note in full satisfaction of his claim on

A., who afterwards refused to convey to B. said real estate, without which B. was insolvent at the time of the transaction and so continued to be.

Held, that A. was released from his obligation to C. *Porter* v. *Dearinger*.....155

2. *Same.*—A. sold to B. a certain woollen factory, for which the latter executed to the former a note and a mortgage on real estate to secure the same. Soon afterwards, B. sold a part of the factory to C., who thereby became indebted to B. in the amount of said note and mortgage. Subsequently, A. B. and C. mutually agreed that A. should take C. for said debt and release B., who, in consideration thereof, should release C., which he then did.

Held, in a suit afterwards brought by A. against B. on said note and mortgage, that this was a valid novation. *Hoffa* v. *Hoffman*.....172

O

OATH.

See DEPOSITION, 1.

OBTAINING MONEY BY FALSE PRETENSE.

See CRIMINAL LAW, 1, 2, 28, 29.

OFFICE AND OFFICER.

See CORPORATION, 2; COSTS; CRIMINAL CIRCUIT COURT, 9; EVANSVILLE; MANUFACTURING, MINING, &c., COMPANIES.

1. *Suit on Official Bond.—Township Trustee.—Conversion of Township Funds.*—Where a township trustee, acting in good faith as such trustee, made a contract for the township which he was legally authorized to make, and thereby became liable in said official capacity to pay the other contracting party a certain sum of money, and afterwards made such payment in goods, his individual property, or by giving credit on an account due him personally from such other party, by the consent of the latter, who thereupon released the township;

Held, that the fact that the trustee retained a corresponding amount of the township funds applicable to that purpose did not constitute a conversion of the funds of the township to his private use, or render him liable therefor in a suit on his official bond. *The State, ex rel. Middle T'p*, v. *Parker et al*.....285

2. *Title to Elective Office.—Contest. Commission.*—A person duly elected by popular vote to an office under the constitution and laws of this State has the right to the possession of such office at the commencement of the term for which he was elected, notwithstanding a contest of such election may be pending; and a commission issued to him after the termination of such contest should be made for the term for which he was elected (commencing, not at the date of the termination of the contest, but at the date at which he was entitled to the possession of the office). *Shannon* v. *Baker, Gov.*390

3. *Term.—Vacancy.—Prison Director.*—When a person is elected by the General Assembly to the office of director of the state prison, since the expiration of the terms for which the first directors were elected, he, if eligible, is entitled to the office for the period of four years from the date of his election, and until his successor is elected or appointed, and qualified; except that when he is elected by reason of a vacancy having occurred in said office, he is entitled to the office only for the unexpired portion of the term of four years in which such vacancy has occurred, and until his successor is elected or appointed, and qualified. *Baker, Gov.*, v. *Kirk*.....517

4. *Same.—Constitutional Law.*—Section 7 of the act of May 13th, 1852 (1 G. & H. 672), is not in conflict with the constitution, so far as offices created by the legislature are concerned, and it applies to and governs the filling of vacancies in such offices created after the passage of said act, as well as those then in existence.....*Ibid.*

OFFICIAL BOND.

See COSTS; OFFICE AND OFFICER, 1; PRINCIPAL AND SURETY, 1, 2.

OPIUM.

See CRIMINAL LAW, 30.

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PARENT AND CHILD.

1. *Legislative Control.*—How far the interference of the legislature in its control of the relation of parent and child should extend, is a question, not of constitutional power for the courts, but of expediency and propriety, which it is the sole province of the legislature to determine. *The State* v. *Clottú*.....409

2. *Same.—Liquor Law.—Minor.*—It is not a good defense to an indictment for selling intoxicating liquors to a person under the age of twenty-one years, that the father of the infant authorized the defendant to make the sale to the minor.....*Ibid.*

PARTIES.

See HUSBAND AND WIFE, 5; INSANE PERSON; PLEADING, 10, 14; PRINCIPAL AND AGENT, 3; TRUST, 2, 3; TURNPIKE, 6.

1. *Heirs.—Covenant of Warranty.*—Where a covenant against incumbrances contained in a deed of conveyance of real estate is broken, and the damages for the breach accrue during the lifetime of the person holding under such covenant, his heir has no right of action on the covenant. In such case the administrator must sue. *Frink* v. *Bellis et al*.....135

2. *Promissory Note.—Agent.*—A promissory note payable to A. B. "agent of the Enterprise Insurance Company," was executed for the use of said company in consideration of a policy of insurance underwritten by it.

Held, in a suit on the note in the name of said company, that the action was brought by the proper party. *Black* v. *The Enterprise Insurance Company*.....223

3. *Demurrer.—Defect of Parties.*—The question of a defect of parties plaintiffs cannot be raised by a demurrer to the complaint for failure to state sufficient facts. *Musselman* v. *Kent et al*.....452

PARTNERSHIP.

See CONTRACT, 5; TRUST, 5.

See SHAW v. SPENCER, 143.

1. *Individual and Partnership Debts.—Mortgage.*—Certain real estate being owned by a firm composed of two partners and used in the business of the partnership, one of them alone executed a mortgage on an undivided half of it, to secure the payment of his individual debt. Afterwards said real estate was sold at sheriff's sale under a judgment rendered, after the execution of said mortgage, against the partners, for a debt of the firm contracted before the execution of the mortgage.

Held, that the mortgagee was not entitled to foreclose his mortgage as against the purchaser at the sheriff's sale, without redeeming or offering to redeem from the sheriff's sale that part of the real estate covered by said mortgage. *Kistner* v. *Sindlinger*.....114

2. *Suit Between Partners.—Code.*—Under the code, a partner can sue his copartner, not to recover the plaintiff's share of the partnership property or assets before the partnership business has been adjusted, but to obtain an adjustment of the partnership affairs and thus recover his entire interest therein. The case made must be such as would formerly have called for the interposition of a court of equity. *Page* v. *Thompson*.....137

3. *Same.*—Three persons were the owners of equal shares of a steamboat, which they ran on joint account as partners. Suit in the usual form as upon an assumpsit by one of them against another to recover one third of the amount which the latter owed the firm for liquors bought by him at the bar of the boat (the third partner being made a defendant to answer as to to his interest). The partnership business had ceased, but there had been no settlement thereof, the firm being still indebted, and having uncollected claims due to it, and no balance having been agreed upon as

due from one partner to the others or either of them, and no special promise having been made by the defendant to pay the plaintiff anything.

Held, that the suit would not lie..*Ibid.*

4. *Execution against one Partner.*—An execution against one of two partners constituting a firm, in favor of a third person, may be levied upon the interest of the execution-defendant in the partnership property, and such interest may be sold thereunder for his individual debt. *Hardy* v. *Donellan*.....501

PATENT RIGHT.

See PROMISSORY NOTE, 7.

PERJURY.

See SLANDER, 4, 5.

PLEADING.

See ANOTHER ACTION PENDING; CRIMINAL CIRCUIT COURT, 12; DECEDENTS' ESTATES, 3; DRAINING ASSOCIATION, 3, 4, 5, 6; EXECUTION, 2, 3; HUSBAND AND WIFE, 5; INJUNCTION, 1; INSURANCE, 1, 5, 7; PRACTICE, 1; RAILROAD, 3; REAL PROPERTY, ACTION TO RECOVER, 1, 2; RES ADJUDICATA; SLANDER, 3; TRESPASSING ANIMALS; TRUST, 3, 5; TURNPIKE, 1; VENDOR AND PURCHASER, 1.

Abatement. *See* EVIDENCE, 14.

Demand of Judgment. *See* VERDICT.

1. *Promissory Note—Assignment.*—In a suit upon a promissory note by an assignee, the fact of the assignment being alleged in the complaint, a surety cannot object to the complaint because a copy of the assignment is not set out. *Smith* v. *Hunter*.....106

2. *Same.—United States Revenue Stamp.*—Suit on an promissory note executed November 20th, 1866. The complaint did not allege that the instrument was stamped, and no copy of a stamp was set out.

Held, that this did not render the complaint insufficient.....*Ibid.*

3. *Fraud.*—A complaint for damages for fraudulent representations by the vendor in the sale of land must contain an averment that the plaintiff relied upon the representions. The want of such averment cannot be supplied by a recital of evidence which might justify a presumption that the representions were relied upon, unless such evidence be conclusive of the fact. *Gaings* v. *White*.....125

4. *General Denial.—Evidence.*—In an action to recover for goods alleged to have been sold and delivered to the defendant, he may show under an answer of general denial, that they were sold and delivered to his wife under such circumstances as not to bind him. *Day* v. *Wamsley*.....145

5. *Answer.*—Suit on a note and mortgage executed by the defendant to the plaintiff. Answer, pleaded in bar, that a third person named was the owner of a certain portion of the land described in the mortgage.

Held, that, as a plea in bar, the answer was bad. *Hoffa* v. *Hoffman*.172

6. *Same.—Counter Claim.—Warranty.*—Answer, also, by way of counter claim, that the note and mortgage sued on were given in consideration of the machinery of a carding machine and woollen factory, and for no other consideration; that the plaintiff warranted the machinery to be sound, in good running condition and free from rust; whereas, it was not in good running condition and free from rust, but out of gear, many of the cogs being broken and many of the rollers being so badly eaten with rust that they were worthless; whereby the defendant was damaged, &c.

Held, that this was a good counter claim.....*Ibid.*

7. *Fraud.*—When the buyer of an article seeks to recover damages of the seller for false and fraudulent representations made by the latter to the former concerning the article, he must allege that he relied on such representations in making the purchase.....*Ibid.*

8. *Answer—Consideration.*—Suit on a promissory note. Answer, that the note was given by the defendant to the plaintiff, "without any consideration of any kind *to this defendant.*"

Held, that the answer was bad on demurrer. *Bingham* v. *Kimball*...184

9. *Bill of Particulars.*—Where a complaint states, in the body of it, a good cause of action, specifying its nature, not upon a general account of several items, but upon one item alone, which is set out, it cannot, under the code, be objected to on demurrer on the ground that no bill of particulars is made a part of it. *The Brooklyn Gravel Road Co.* v. *Slaughter* 185

10. *Parties.—Set-Off.—Promissory Note.*—Suit on a note by the payee against the maker. Answer, that the note was given in consideration of the sale of a certain number of sheep purchased by the defendant of a third person named, and for no other consideration; that it was made payable to the plaintiff at the request of said third person, who *represented* that he desired it made payable to the plaintiff for the purpose of enabling him to place it in the plaintiff's hands as his agent for collection, and for no other purpose; that at the time the note was given, said third person was indebted to the defendant in a certain sum, of which a bill of particulars was annexed; and the defendant offered to set off said indebtedness against the note.

Held, that the answer was bad, for the reason that it did not allege that the plaintiff was not the owner of the note in his own right, or that said third person had any right thereto or beneficial interest therein. *Waddle* v. *Harbeck*.....231

11. *Complaint.—Deceit.—Contract.*—A complaint by A. against B. alleged, that on, &c., there was a litigation anticipated between the plaintiff and one C., arising out of an alleged case of bastardy; that the defendant having knowledge of said fact, reported to the plaintiff, that, for two hundred and fifty dollars, he could and would compromise and settle it and procure a release; that afterwards, the defendant informed the plaintiff that he had compromised it for two hundred dollars, and had taken a bond in the sum of one thousand dollars, from C., D., and E., not to institute suit against the plaintiff for said bastardy; that thereupon plaintiff executed to defendant two notes, one for one hundred dollars, and the other for one hundred and fifty dollars, the first of which was paid at maturity, but the other remained unpaid and was still in the possession of defendant; that after the payment of said first note, plaintiff was arrested on account of said alleged bastardy, and then first learned, and it was true, that he had been deceived and imposed on by the defendant, who had never compromised the anticipated litigation, or attempted to do so; that said notes were executed in consideration of the false and fraudulent pretense and representation aforesaid, and for no other consideration; that in consequence of said false and fraudulent representation and pretense, by which his signature to the notes was obtained, "and the failure of defendant to comply with his said agreement," the plaintiff had been damaged in, &c.

Held, that this was a complaint for deceit, and not on contract. *Watts* v. *McAllister*.....264

12. *Promissory Note.—Harmless Error.*—In a suit on a promissory note, the complaint alleged that the note was endorsed to the plaintiff by the payee, who appeared and answered, and judgment was rendered against him, though his name did not appear in the complaint as a defendant except in the title of the cause.

Held, on demurrer by the maker, that the omission of the name of the payee as a defendant, in the body of the complaint, if error, could not avail the maker. *The Indianapolis Piano Manuf'g Co.* v. *The First National B'k*.....303

13. *Same.—Copy of Assignment.*—In a suit on a promissory note by an indorsee, the maker cannot avail himself of the failure of the complaint to set out a copy of the assignment, the fact of the assignment being averred. *Ibid.*

14. *Answer.—Party in Interest.*—In an action on a promissory note by an indorsee against the maker, an answer admitting the execution of the note and alleging that the plaintiff is not the real party in interest, that he has no interest whatever in the note, and that it belongs to a third person, but not stating facts

authorizing such conclusions, is bad on demurrer. *Hereth et al.* v. *Smith*.....514

15. *Set-off.—Account.*—An answer by way of set-off, based upon an account for work and labor, money paid out, and materials furnished, is bad on demurrer, if no account be filed therewith. *Biddle* v. *Reed*..529

PRACTICE.

See ANOTHER ACTION PENDING; APPEAL; ARREST OF JUDGMENT; BASTARDY, 2; BILL OF EXCEPTIONS; CRIMINAL LAW, 26; DECEDENTS' ESTATES, 2; DEPOSITION; DIVORCE; EXECUTION, 2, 3; EVIDENCE, 16; INJUNCTION, 5, 6; INSTRUCTION TO JURY; JUDGE; JUDGMENT; JURY; PARTIES; PLEADING, 12, 13; REPLEVIN; RES ADJUDICATA; SUPREME COURT; WAIVER; VENUE.

1. *Pleading.—Evidence.—Error Cured.*—Suit on a contract for the delivery by the defendant of a certain number of saw-logs to be sawed by the plaintiff at a stipulated price per hundred feet, the breach alleged being the failure of the defendant to deliver a portion of the logs. Answer, that the defendant delivered a certain number of logs, which the plaintiff sawed in such an unworkmanlike manner that the lumber was worthless, and, the plaintiff refusing to saw properly, the defendant refused to deliver more logs. Reply, the general denial. On the trial, after the defendant had offered evidence tending to sustain said answer by proving that the lumber was bad, the plaintiff offered evidence tending to show that the logs delivered were such that good lumber could not be made from them. This evidence of the plaintiff was rejected until an additional reply alleging the fact had been filed, by leave, over the defendant's objection, when, a demurrer to the additional reply having been overruled, said evidence of the plaintiff was admitted and the trial proceeded, the jury not having been resworn, and the defendant objecting.

Held, that the evidence should have been admitted when first offered under the reply in denial; that the additional reply did not change the issue, and there was no necessity for reswearing the jury; that the demurrer to the additional reply might properly have been sustained, or the paragraph to which it was filed might have been stricken out on motion, or leave to file it should not have been given; yet that no wrong resulted from these proceedings. *Dunn et al.* v. *Johnson*.....54

2. *Trial Without Reply.*—Where a defendant, without asking a rule for a reply or calling the attention of the court to the fact that no reply has been filed, voluntarily goes to trial as though the facts alleged in his answer had been denied, it is too late after he has been beaten on the trial upon the merits to raise the objection that a reply was not filed. *The Harrison, &c., Turnpike Co. et al.* v. *Roberts*.....246

3. *Harmless Error.—Demurrer.*—A demurrer to a special paragraph of reply directed to an entire answer, as to one paragraph of which said paragraph of reply was bad, was overruled. On the trial, no evidence was offered in support of the answer, to all the paragraphs of which the general denial was pleaded.

Held, that the error in overruling said demurrer was not available to the defendant. *Nave* v. *Wilson, Adm'r*.294

4. *Abatement.*—Where an answer in abatement is not verified by affidavit, it seems that it would be proper to refuse to hear an objection to it on that ground after the jury has been sworn to try the cause. *Wilson* v. *Poole*.....443

5. *Same.—Amendment.—Reswearing Jury.*—Where a plea in abatement had been stricken out for want of verification by affidavit, after the jury had been sworn to try the cause, but before any further step had been taken;

Held, that it was too late for the defendant to ask leave to supply the verification.

Held, also, that it was not necessary to reswear the jury to try the remaining issues.....*Ibid.*

PRESUMPTION.

See EVIDENCE, 10.

PRINCIPAL AND AGENT.

See PARTIES, 2; CASES OVERRULED, &c., 3.

Declarations of Agent. *See* EVIDENCE, 9.

1. *Notice to Agent.*—In a suit for goods sold and delivered, it having appeared that they were sold and delivered to the defendant's wife;
Held, that the fact that one who was a salesman of the plaintiff at the date of the sale and assisted in the sale of a part of the goods had been told by a disinterested person in an idle conversation some months before (it not appearing that said salesman was then in the employment of the plaintiff), that the defendant and his said wife were separated at that time, could not charge the plaintiff with notice of the fact so communicated. *Day* v. *Wamsley*.....145
2. *Delivery to Agent.*—A. sold to B. a number of sheep, to be delivered at a certain time and place, of a specified quality, and at a stipulated price per pound. On the day agreed upon for the delivery, B. sent a letter to A., stating that on account of sickness he had sent a man to receive the sheep according to contract, directing A. to weigh the sheep and send the weight thereof, and promising to send the money therefor by express; and B. instructed his said agent to receive none but good sheep, which fact was communicated by said agent to A., who delivered a certain number of sheep to the agent, who had a fair opportunity to judge of their quality, and did so judge, and received them as good sheep.
Held, that B. was bound by said action of his agent. *Rapp* v. *Stith*.244
3. *Promissory Note.*—A corporation known as "The Aurora Brewing and Malting Company" executed a note signed "C. C. Kelsey, Ass't Sec'y Aurora Brewing and Malting Company."
Held, that this was the note of the corporation, and not that of C. C. Kelsey personally. *Gaff et al.* v. *Theis*.....307

PRINCIPAL AND SURETY.

1. *Official Bond.*—Where A. was requested to become a surety on a sheriff's official bond by B., a person having no connection with the bond, which was not then present, and A. told B. that the latter might sign the name of the former to the bond, provided that C. and D. first executed it, and A. never having seen the bond, never having been requested by said sheriff to execute it, and never having had any communication in relation to the bond with said sheriff or any other person, except B., the name of A. was signed by B. to the bond, which was never executed by C. or D.;
Held, that A. was not bound as a surety. *Bagot et al.* v. *The State, ex rel. Dennison*.....262
2. *Same.—Sheriff's Return.*—A sheriff's return to an execution, showing the collection of money thereon, is conclusive upon the sureties on his official bond in a suit on such bond on the relation of the execution-plaintiff for the failure of the officer to pay over such money. *Ibid.*
3. *Promissory Note.—Consideration.* Where a promissory note with surety has been given upon an agreement that the payee shall deliver up to the maker another note for the same amount theretofore executed by the same maker with other surety to the same payee, and the payee fails to so deliver up said other note, there is no consideration to support the new note. *Heeg et al.* v. *Weigand et al*.....289
4. *Same.— Additional Security.*— If such new note be given to indemnify the surety on the old note, the new one becomes an additional security in the hands of the payee, and the surety for whose indemnity it has been given, having paid the debt and received said new note from the payee, may recover thereon against the new surety.....*Ibid.*

PRISON DIRECTOR.

See OFFICE AND OFFICER, 3.

PROCESS.

1. *Publication.— Name.— Collateral*

Proceeding.—Attachment.—The introduction of a wrong initial letter between the Christian name and the surname of a plaintiff in the publication of notice of the pendency of a proceeding in attachment, in a court of superior jurisdiction, the introductory steps authorizing the publication having been properly taken, does not render the subsequent proceedings under such notice void, but simply erroneous; and until reversed by an appellate court, the judgment and proceedings under it are effective and conclusive between the parties. *Morgan et al.* v. *Woods*.....23

2. *Same.—Date of Term.*—Such a notice by publication stated that the term of court was to be held "on the third Monday of August, 1887." *Held*, that the fact that the time of holding the court was fixed by law made this error of date unimportant.....*Ibid.*

PROMISSORY NOTE.

See PARTIES, 2; PLEADING, 8, 10, 12, 13, 14; PRINCIPAL AND AGENT, 3; PRINCIPAL AND SURETY, 3, 4; TRUST, 3.

1. *Suit by Assignee.—Representations of Maker.*—The maker of a promissory note, not governed by the law merchant, made and delivered to the payee, to enable him to negotiate the note, a separate writing, of even date with the note, as follows:

"BEARCREEK TP., Ind., July 28th, 1865.

"This is to show that the note given by me this day to" A. B, "for $75 is all right and will be paid when it comes due." (Signed) C. D. The note was assigned before maturity to one who was induced to purchase it by reason of said writing, which accompanied it.

Held (ELLIOTT, J., dissenting), in a suit on the note by said assignee against the maker, that the latter might impeach the note for want of consideration and fraud in obtaining it. *Jaqua* v. *Montgomery*.....36

2. *Same.—Forbearance by Assignee.*—The assignee of a promissory note, not governed by the law merchant, to whom it was assigned before maturity, after it became due agreed to extend the time of payment for a definite period, and did so, upon the promise of the maker that, if the assignee would so forbear, he would pay it at the expiration of such period.

Held (GREGORY, C. J., dissenting), that this promise of the maker constituted a new contract, binding in law, and capable of enforcement, though the maker had a good defense to the note before its assignment.....*Ibid.*

3. *Pleading.—Assignment.*—In a suit upon a promissory note by an assignee, the fact of the assignment being alleged in the complaint, a surety cannot object to the complaint because a copy of the assignment is not set out. *Smith* v. *Hunter*.....106

4. *Same.—United States Revenue Stamp.*—Suit on a promissory note executed November 20th, 1866. The complaint did not allege that the instrument was stamped, and no copy of a stamp was set out.

Held, that this did not render the complaint insufficient.....*Ibid.*

5. *Collateral Security.*—Where a creditor has obtained a judgment, which is collectable, on a note held by him as collateral security, he will not be thereby prevented from availing himself, to the extent of his entire claim, of another note held by him as collateral security for the same claim.....*Ibid.*

6. *Attorney's Fees.—Evidence.*—On the trial of an action on a promissory note which provided for the payment of "all costs and attorney's fees for collection," if the note should not be paid at maturity, the only evidence introduced was the note sued on.

Held, that there could be no finding for attorney's fees. *Bowser et al.* v. *Palmer*.....124

7. *Patent Right.*—A promissory note executed in 1866, in this State, and made payable at a bank therein, contained the words, "this given for patent right."

Held, that these words did not affect the character of the instrument as a promissory note governed by the law merchant. *Hereth et al.* v. *Meyer*..... 511

PROSECUTING ATTORNEY.

See CRIMINAL LAW, 4.

PUBLICATION.

See PROCESS, 1, 2.

R.

RAILROAD.

See COMMON CARRIER; EVIDENCE, 9; STOPPAGE IN TRANSITU.

1. *Unnecessary Injury to Lands.—Suit for Damages.*—The charter of a railroad company provided, that "in all cases where the owners of land or stone necessary for the use and construction of said road shall refuse to relinquish the same to the corporation, or shall refuse to accept a fair compensation therefor, it shall be lawful for the corporation, by their president or any superintendent, agent, or engineer employed by them, to enter upon and take possession and use the same, avoiding in all cases unnecessary damage or injury to the owners or proprietors;" and the charter then provided the mode of the assessment and payment of the damages to the land-owner.

Held, that the damages to be assessed and paid in the mode prescribed by the charter were those resulting from a construction of the road with care, skill, and prudence, not only as to the safety of persons and property passing over the road, but also as to the protection and safety of the property holder; and that if by reason of any want of care, skill, or prudence for the protection and safety of the land-owner, his property was unnecessarily damaged in the construction or repairing of the road, he might recover therefor in an action for damages as at common law. *The Terre Haute and Indianapolis R. R. Co.* v. *McKinley*.....274

2. *Negligence.*—No neglect of duty on the part of a railroad company will excuse any person approaching on a highway a crossing of the track of said company from using the senses of sight and hearing, where these may be available; and injury to such person where the use of either of such faculties would have given sufficient warning to enable him to avoid the danger, conclusively proves negligence, and there can be no recovery for such injury, unless the railroad company has been guilty of such conduct as to imply an intent or willingness to cause the injury; and this can be attributed only where the company has notice of the particular emergency in time to avoid the collision by the use of ordinary diligence, the means being at hand. If the injured person had such warnings and opportunities of knowledge as would, with ordinary caution in such circumstances, have saved him from the danger, he will be held to have knowingly contributed to his own injury. The failure of a railroad train to give any signal when nearing a public crossing is not of itself negligence, in this State, unless the peculiar circumstances, the concealment of the train or the like, may render it necessary and proper. *The Bellefontaine R. W. Co.* v. *Hunter, Adm'r*.....335

3. *Injury to Animals.—Pleading.*—A complaint before a justice of the peace against a railroad company, for killing stock, alleged, "that the defendant, on or about," &c., "at and in said county of," &c., "and State of Indiana, by its locomotive and train of cars then running on its railroad, at a point on its said road in said county where its railroad track was not securely fenced, ran over and killed two hogs of the plaintiff of the value of fifty dollars; wherefore," &c.

Held, that the complaint stated sufficient facts. *The Bellefontaine R. W. Co.* v. *Reed*.....476

4. *Same.—Fences.*—A railroad company is liable for animals killed or injured by its train at a point where its road was not securely fenced, although the owner of such animals permitted them to run at large with knowledge of such defective condition of the fence, unless it was unlawful or impracticable to fence at such point; and the fact that such railroad company owned the land, and was using it as a place in which to deposit wood, to be removed as

the exigencies of the company might require, does not relieve the company from such liability.....*Ibid.*

REAL PROPERTY, ACTION TO RECOVER.

See INJUNCTION, 1; JUDGMENT, 4; TURNPIKE, 15.

1. *Pleading.*—In an action to recover the possession of real estate, the fact that in one paragraph of the complaint the plaintiff seeks to recover, together with the property claimed in another paragraph, other property taken possession of by the defendant at a different time and under different circumstances, is not a good reason for striking out that portion in relation to such additional claim or the paragraph containing it. *The Harrison, &c., Turnpike Co. et al.* v. *Roberts*.....146

2. *Same.—Description of Real Estate.* A complaint against a turnpike company to recover possession of real estate described a portion of the property as "all that part of the south-west quarter of section 33, township 9, in range 2 west, in," &c. (naming the county in which the action was brought), "on which is located and constructed the turnpike road and toll-house of said company;" and described another portion by metes and bounds, "commencing at the south-east corner of said toll-house and running thence east eight and one-half feet," &c., "to the place of beginning."

Held, that the descriptions were sufficient..... .....*Ibid.*

RECEIVER.

See INSURANCE, 1 to 5.

RECEIVING STOLEN GOODS.

See CRIMINAL LAW, 24, 25, 26.

RECOGNIZANCE.

See APPEAL, 4.

RECORD.

See BILL OF EXCEPTIONS; EVIDENCE, 18; HIGHWAY, 2; JUDGE, 1; SLANDER, 5.

REPAIRS.

See LANDLORD AND TENANT.

REPLEVIN.

See CONTRACT, 4; EVIDENCE, 5.

Form of Judgment.—Motion for New Trial.—A judgment for the plaintiff in an action of replevin should be in the alternative—that the plaintiff recover the possession of the property, or the value thereof in case a delivery cannot be had—and for damages for the detention; but where the finding contains all the requisites for the rendering of a proper judgment for the plaintiff, and the judgment is not in the form so prescribed, being simply for the value of the property and damages, no question as to the defective form of the judgment is raised by a motion for a new trial assigning for cause, "that the judgment is contrary to law and is not supported by sufficient evidence." *Thompson* v. *Eagleton*.....300

REPLY.

See PRACTICE, 2, 3.

RESCISSION.

See FRAUD, 1; INSURANCE, 2.

RES GESTÆ.

See EVIDENCE, 9.

RES ADJUDICATA.

See JUDGMENT, 3.

Decedents' Estates.—Set-Off.—Where an account has been filed as a claim against a decedent's estate, and final judgment on the merits of the cause has been rendered, such judgment, remaining in force, is a bar against said account as a set-off in a suit by the administrator of said estate against the claimant upon a note

executed by the latter to said decedent. *Nave* v. *Wilson, Adm'r*.....294

RESTRAINING ORDER.

See INJUNCTION, 5, 6.

RESCUE.

See CRIMINAL LAW, 3.

RETURN.

See PRINCIPAL AND SURETY, 2.

RIPARIAN OWNER.

See CRIMINAL LAW, 16.

Ice.—When the water of a flowing stream running in its natural channel is congealed, the ice attached to the soil constitutes a part of the land and belongs to the owner of the bed of the stream, who has the right to prevent its removal. *The State* v. *Pottmeyer*.....402

RULE OF COURT.

See VENUE, 2.

S

SABBATH.

See CASES OVERRULED, &c., 5; CRIMINAL LAW, 7, 8, 9, 10, 18; EVIDENCE, 6.

SALE.

See FRAUD, 2; PLEADING, 6, 7.

1. *Failure of Consideration.—Deceit.* A. exhibited to B. a schedule, as a representation of the quantity of certain personal property, which the former proposed to sell to the latter, who before purchasing, visited the place where the property was situated, for the purpose of examining the property and satisfying himself concerning it, and having examined it as to quantity, or having had a full opportunity to do so, relying on his own judgment, proposed other terms than those proposed by A., by offering a sum in gross for an entire amount of property, including that named in said schedule and other articles situated at the same place, and A. accepted the offer, and the sale was made on the terms so proposed by B.

Held, in a suit on a note given in part payment, that the maker could not set up as a failure of consideration, that the property named in said schedule was of less quantity than therein represented; and that the buyer could not claim that the seller had deceived him as to the quantity of the property named in the schedule. *Pattison et al.* v. *Jenkins*.....87

2. *Same.*—Where a full opportunity is afforded to a purchaser for examining property, which he is about to purchase, and which by the exercise of ordinary diligence and prudence he could examine as to its quantity, the question of the quantity being made to depend merely on the judgment, and he fails to exercise such diligence and prudence, he cannot after the sale complain that he has been deceived as to the quantity, or claim a deduction from the price on account of the quantity..... *Ibid.*

3. *False Representations.*—In the sale of a woollen factory, its manufacturing capacity and the amount of custom which it has had in the past are matters which the seller is bound, in good faith, not to knowingly misrepresent to the buyer ignorant of the facts and relying on the representations of the seller. *Hoffa* v. *Hoffman*.....172

SCHOOL TAX.

See COUNTY TREASURER, 1.

SET-OFF.

See ANOTHER ACTION PENDING; PLEADING, 10, 15; RES ADJUDICATA; TRUST, 2, 3.

SHERIFF.

See ESCAPE; EXECUTION, 1; PRINCIPAL AND SURETY, 1, 2.

SLANDER.

1. *Malice.—Defense.*—To render slan-

derous words actionable, malice is essential; but where words actionable in themselves are spoken in a criminal sense and are false, malice is implied. The fact that they are spoken in the heat of passion or under excitement may be shown in mitigation, but cannot bar the action. *Mousler et ux.* v. *Harding*..176

2. *Husband and Wife.— Witness.*—In an action against husband and wife for slanderous words spoken by the wife;

Held, that the wife was a competent witness in her own behalf.

Held, also (ELLIOTT, J., dissenting), that the husband was a competent witness for himself.....*Ibid.*

3. *Pleading.— Code.*—Under our code, a defendant in an action for libel or slander may, in one paragraph of his answer, deny the allegations of the complaint, and in another paragraph plead in confession and avoidance. *Weston* v. *Lumley*...486

4. *Evidence.—Perjury.*—On the trial of an action for slander by A. against B, the complaint charging the defendant with having imputed perjury to the plaintiff by saying that in an affidavit made by the plaintiff, attached to and verifying a petition to the board of county commissioners to cause a certain road, alleged in said petition to have been in use twenty years, but not recorded, to be entered of record as a public highway, as provided by statute, Acts 1867, p. 133, the plaintiff had sworn to a lie;

Held, that said petition, it having been proved to be the original, and the affidavit attached thereto having been proved to have been made by the plaintiff, was admissible in evidence over the defendant's objection .....*Ibid.*

5. *Same.—Jurisdiction.— County Commissioners.*—Said petition to the board of commissioners did not allege that said road had been used *as a public highway* for twenty years. On the trial before the commissioners, A. testified as a witness, having been duly sworn by the county auditor. The commissioners found that the road had been used as a public highway for twenty years, and ordered it to be entered of record as a public highway as described in the petition.

Held, that notwithstanding the petition was defective and the proceeding irregular, yet the board of commissioners, though a court of inferior and limited jurisdiction, had, under said act of 1867 and the matters stated in the petition, such jurisdiction of the subject-matter as to make it legal perjury for A., as such witness, to testify falsely, knowingly, and corruptly.

Held, also, that on a trial of an action for slander by A. against B. for having imputed perjury to the plaintiff by saying that A., in his oral testimony on said trial before the commissioners had sworn to a lie, the record of the proceedings in the commissioners' court was admissible in evidence over the objection of the defendant.....*Ibid.*

SOLDIER.

Bounties.— County Commissioners.— Order of Construed.—The board of commissioners of a certain county made an order appropriating one hundred and fifty dollars, to be paid out of the military fund thereafter to be created by taxation, to each person who had then volunteered or might thereafter volunteer in the army of the United States, in obedience to the proclamation of the President calling for volunteers, provided said volunteer was duly credited to the quota of said county; and the order contained a provision, "that if any one so mustered into the service of the United States shall have received from the county or any township thereof any sum, the same shall be deducted from the above amount; and if he shall have received a sum equal to or more than one hundred and fifty dollars from the county or any township on account of such volunteering, then, in that event, he shall receive nothing from this appropriation.

Held, in a suit for a mandate to compel the treasurer of said county to pay a warrant issued, under said order, to a volunteer, that money paid to said volunteer by the citizens of a township in said county

out of a fund raised by voluntary contribution, to induce him to volunteer and allow himself to be credited to that township, did not come within said provision of said order. *Priest* v. *Farneman, Treas.*..397

SPECIAL FINDING.

See VERDICT, 2.

SPECIAL VERDICT.

See VERDICT, 3.

SPECIFIC PERFORMANCE.

See STATUTE OF FRAUDS, 2.

STAMP.

See PROMISSORY NOTE, 4.

STATUTE OF FRAUDS.

1. *Interest in Land.*—The right to use, for the purpose of worship, a church edifice when not occupied by the church to which it belongs, is an interest in real estate, and a contract therefor, to be valid, must be in writing, signed by the party to be charged. *Brumfield et al.* v. *Carson et al*.....94
2. *Sale of Land.—Specific Performance.*—In a suit to foreclose a mortgage on real estate by the mortgagee against the mortgagor, the wife of the latter, on her application, became a defendant, and filed an answer and cross complaint, averring, that when she married her co-defendant, she was entitled to the proceeds arising yearly from a certain sum of money during her life; that her said husband proposed that if she would sell said prospective income for a sum in hand and let him have said sum, he would let her have the lots described in said mortgage and would convey them to her with their improvements and would make additional improvements on them with said money, till they should be of a certain value; that she, to secure a home, in good faith, accepted said proposition, sold said yearly income at a sacrifice for a certain sum, and let her husband have a certain portion thereof on said agreement; that afterwards, her husband promised to make, and under her directions made, improvements on said real estate of certain value, by building thereon a house, he being enabled to do so from the money so obtained from her, no part of which had been repaid to her; that he had not made improvements on the property sufficient to make it worth the sum so given him by her, and it was worth not more than the amount he had so agreed to make it worth; that the house so built was in her possession during its erection, and was afterwards occupied by her and her said husband as a family residence, but was under her control and considered by them as being in her possession from its erection till the commencement of this suit, since which time she had rented it to other persons; that at various times her said husband had promised to convey the property to her, but neglected to do so; and that long before the execution of said mortgage and before the creation of the debt secured thereby, the mortgagee had full notice of the equities of said wife.

Held, that the facts shown by the answer and cross complaint were sufficient to entitle the wife to specific performance. *Hixon et al.* v. *Cuppy*.....210

STATUTE OF LIMITATIONS.

See TRUST, 4.

STATUTES CONSTRUED.

See CITY, 4; CRIMINAL CIRCUIT COURT, 8; DRAINING ASSOCIATION, 7; MANUFACTURING, MINING, &c., COMPANIES; TAX, 1 to 9; TURNPIKE, 2.

Disturbing lawful assemblage. See CRIMINAL LAW, 27.

Lawful fence. See TRESPASSING ANIMALS.

School Tax. See COUNTY TREASURER, 1.

Street; change of grade. See CITY, 5, 6.

Desecration of Sabbath. See CRIMINAL LAW, 18.

STOPPAGE IN TRANSITU.

A. shipped from Chicago a quantity of wheat, consigned, according to

bill of lading in duplicate taken by him, to B., at Indianapolis, *on account of A.*, who had contracted it to B., but it was not to be his till paid for. A. drew at sight, on the date of the shipment, for the price of the wheat, attaching to the draft one copy of the bill of lading indorsed, and negotiated the draft at a Chicago bank, which transmitted it to an Indianapolis bank for collection. During the forenoon of the day after the shipment, while the wheat was in transit, C. purchased the wheat of B., at Indianapolis, and paid for it, taking from him at the time a bill of lading for the wheat, issued by a railroad company at Indianapolis, on that day, to B., on account of C., who supposed the wheat had then arrived at Indianapolis. The shipping list had been received, but the wheat did not arrive till the night of the following day. C. had no notice of any right of A. to the wheat. Said draft reached Indianapolis at about the hour that B. sold the wheat to C. An attempt was immediately made to present the draft, but B., the drawee, who was insolvent and failed that day, could not be found. In the afternoon, the Indianapolis bank notified the carrier, said railroad company, to hold the wheat for the consignor; and at a later hour on the same day, a similar notice was given at the express instance of said consignor; and the wheat was held accordingly.

Held, in an action of replevin by C., that he had no right to the possession of the wheat. *Pattison* v. *Culton et al*.....240

SUBSCRIPTIONS.

See TURNPIKE, 1, 2.

SUNDAY.

See CASES OVERRULED, &c., 5; CRIMINAL LAW, 7, 8, 9, 10, 18; EVIDENCE, 6.

SUPREME COURT.

See ASSIGNMENT OF ERROR; BILL OF EXCEPTIONS; DIVORCE; JUDGE, 1, 2; JUDGMENT, 1, 2.

1. *Weight of Evidence.*—The Supreme Court will not interfere, upon the weight of the evidence, with a finding, unless it is clearly against the evidence, and can be considered only as the result of passion, prejudice, or a palpable misapprehension of the facts. *Achey* v. *The State, ex rel. Barnes*.....82
2. *Same.*—The Supreme Court will not, upon the weight of the evidence of witnesses who testified before the lower court, interfere with the finding, unless it is clearly against the evidence and can be considered only as the result of passion, prejudice, or palpable misapprehension of the facts. *Smith* v. *Kruger*.....86
3. *Evidence.*—The Supreme Court will not interfere with a finding because it is contrary to the weight of conflicting evidence. *Robinson* v. *Jamison*.....122
4. *Complaint.—Demand.—Verdict.*—The Supreme Court will not reverse a judgment, in a cause in which there is an answer, because the amount of the finding is greater than the amount claimed in the complaint.....*Ibid.*
5. *Weight of Evidence.*—The Supreme Court will not disturb a verdict upon the weight of the evidence of witnesses who testified before the court below. *Bingham* v. *Kimball*.....184
6. *Trial Without Issue.*—The fact that there was a trial without an issue cannot be taken advantage of in the Supreme Court without having been noticed below. *McCormick* v. *Hyatt*.....546

T

TAX.

See COUNTY TREASURER, 1, 2; EVIDENCE, 17.

1. *Bank Stock.—National Bank.—Statute Construed.*—The act of March 15th, 1867 (Act 1867, p. 216), authorized the collection of a tax on shares of capital stock owned in National banks located in this State, assessed in the manner provided for in said act, for state and county purposes, for the year 1867. *Whitney et al.* v. *Ragsdale, Treas*.....107
2. *Same.—Constitutional Law.*—The fact that under said act the stock-

holder, in the listing and valuation of his stock, is represented by an officer of the bank, does not render the act in conflict with the provision of the constitution requiring a uniform and equal rate of assessment and taxation.....*Ibid.*

3. *Same.—Residence of Stockholder.*—The requirement of said act, that the stock shall be taxed at the place where the bank is located, is not invalid where the owner of the stock lives in another county or state.*Ibid.*

4. *Same.—Officer of National Bank.—Authority of State Over.*—The fact that said act provides that an officer of the bank shall list the stock, does not render the act ineffectual in the case of National banks.....*Ibid.*

5. *Same.*—The capital stock of a National bank originally organized under the act of Congress of 1863, is not exempt from taxation under the act of our Legislature of March 15th, 1867, Acts 1867, p. 216. *Strader et al.* v. *Manville, Treas*.....111

6. *Same.—Tax Duplicate.—Auditor and Treasurer.*—Where the assessment under said act of 1867 has been omitted by the county auditor, and he has delivered the tax duplicate to the treasurer, the latter should insert it; but if a correct assessment be made by the auditor after such delivery and acted upon by the treasurer, it is sufficient.*Ibid.*

7. *Same.— Injunction.*— Where the correctness of an assessment so made by the auditor, in the number of the shares and the amount of the tax, was not questioned;

Held, that an injunction would not lie to restrain the collection of the tax because, the officers of the bank having failed to deliver to the auditor the statement provided for in the second section of the act of 1867, he did not summon them before him and obtain from them such statement.....*Ibid.*

8. *Same.—Residence of Stockholder.* The capital stock of a National bank, liable under the act of 1867 to taxation at the place where the bank is located, is not also liable under the general law to taxation again at other places where the stockholders reside.....*Ibid.*

9. "*Demands.*"—*Statute Construed.*—The word "demands" in the third clause of the twenty-third section of the act to provide for the valuation and assessment of real and personal property and the collection of taxes, &c., 1 G. & H. 68, relates only to such demands as the law will recognize and enforce; and no contract by which a liability is created after the first day of January can relate back so as to make the creditor liable to be taxed for that year for such demand. *Lamb, Treas.*, v. *Rawles, Ex'r*.....386

TIME.

See LIQUOR LAW, 5.

TOWN.

1. *Prosecution for Violation of Ordinance.—Affidavit.*—In a prosecution for a violation of a town ordinance prohibiting the sale of intoxicating liquors within the town, except for certain specified purposes, without a license from the board of trustees of the town, the affidavit on which the prosecution was based did not state when the ordinance was passed, and did not aver that the sale charged was not made for either of the purposes so excepted.

Held, that if the ordinance were valid, yet, because of said omissions in the affidavit, the cause was properly dismissed on motion of the defendant, no offer having been made to amend the affidavit in these particulars. *Town of Martinsville* v. *Frieze*.....507

2. *Amendment of Laws.*—The act of March 11th, 1867 (Acts 1867, p. 220), "to amend the seventh *clause* of section 22" of the "act for the incorporation of towns," &c. (1 G. & H. 619), is not in conformity with section 21 of article 4 of the constitution.....*Ibid.*

3. *License to Sell Intoxicating Liquors.* The board of trustees of an incorporated town have no authority to pass an ordinance prohibiting the sale of intoxicating liquors within the limits of the corporation with-

out a license obtained for such purpose by the seller from such board. *Ibid.*

TOWNSHIP TRUSTEE.

See COSTS; OFFICE AND OFFICER, 1.

TREASURER.

Of county. *See* COUNTY TREASURER; TAX, 6, 7.

TRESPASS.

See CRIMINAL LAW, 16.

TRESPASSING ANIMALS.

1. *Lawful Fence.*—Our statute defining a lawful fence and prohibiting a recovery of damages for cattle breaking into grounds not inclosed by such a fence (1 G. & H. 342) applies only to outside fences; as to inside divisions, parties are left to their common law rights and liabilities in respect to trespassing animals. *Cook* v. *Morea*.....497
2. *Same.—Pleading.*—In an action commenced before a justice of the peace to recover damages for trespass by the defendant's cattle upon the plaintiff's cornfield, the complaint did not allege that the cornfield was inclosed by a lawful fence, or that the entry was made under other circumstances that would not preclude the right of action.

Held, that the complaint was not, for this reason, insufficient for a justice's court, or, it would seem, for the circuit court or court of common pleas.....*Ibid.*
3. *Adjoining Proprietors.*—A person is not responsible for cattle, not under his charge or control, entering, from his pasture, where he keeps his cattle, upon adjoining land of another, and there doing injury, whether there be a partition fence or not.....*Ibid.*

TRUST.

1. *Contract.—Construction of.*—A contract executed and acknowledged by A. and duly recorded, recited, that B. had made a proposition to A. to invest money in lands, the title thereof to be vested in A., who was to convey to B. half the profits after deducting the capital of A. invested and interest, at the end of five or ten years, as most agreeable to A., which capital and interest was to be reimbursed to A. by sale or appraisement of the land, the expense of locating or purchasing the lands to be divided equally between A. and B.; that A had accepted said proposition, and, in pursuance of the agreement so made, B. had invested divers sums and delivered to A. the evidences of title, in a satisfactory manner, of certain lands described; and then the contract provided that, in consideration of the facts so recited and one dollar, received of B., A., binding his heirs and executors, covenanted and agreed with B. and his heirs and executors to hold said lands for the purpose mentioned in said recital for five years from the time the capital was invested (unless it should be mutually agreed by A. and B. to sell the same or any part thereof sooner); that whenever a certain sum with interest thereon from a certain date, with all sums paid from taxes, or improvements made by A. with B.'s consent, and interest thereon, should be reimbursed by public sale or otherwise, one-half of the surplus profit over and above said money expended and interest thereon should be paid to B. his heirs and executors; that if said capital and interest should be reimbursed by partial sales, the residue of lands should remain in the hands of A. and B. until the expiration of said ten years, unless sooner sold or divided; that B. was empowered and authorized to take the care and agency of said lands and do whatever should be necessary to protect and preserve them from waste or injury, and to make such betterment and improvements as should be agreed to by A. in writing; that B. was authorized and empowered to sell, deed, and convey the lands in A.'s name or to bargain them by article or agreement, but that no sale should be obligatory without A.'s consent in writing. Afterwards, within five years, sundry parcels of the lands were sold and

conveyed, from the proceeds of which A. was reimbursed for all the investments secured to him by the contract, leaving a portion of the lands undisposed of.

Held, that B. had under said contract an interest in said remaining lands as *cestui que trust*, which could be enforced against A. *Ellsworth et al.* v. *Mace et al*.....73

2. *Trustee.—Suit by.*—In a suit by a trustee, the defendant may set off a debt due him from the *cestui que trust*. *Waddle* v. *Harbeck*.....231

3. *Same.*—Suit on a note by the payee against the maker. Answer, by way of set-off, that the plaintiff was not the owner of the note and had no interest in it, but was merely the agent of a third person named, who procured the note to be made payable to the plaintiff, to enable the latter to collect it as such agent, and for no other reason; that the note was given for certain articles sold to the defendant by said third person; that at its date said third person was indebted and still continued to be indebted to defendant for goods sold and delivered by the latter to the former, of which a bill of particulars was filed, amounting to a certain sum, less than the amount of the note; that, by agreement of the parties, said note was made payable to the plaintiff for the purpose of enabling him to settle the same and receive from the defendant the excess over the amount of said indebtedness, which it was agreed, when the note was made and delivered, should be applied in part payment of the note.

Held, that the answer, if true, made the plaintiff a trustee of an express trust, under the statute, and capable of maintaining the action in his own name.

Held, also, that the answer was good on demurrer.....*Ibid.*

4. *Fraud.—Statute of Limitations.*—Certain land mortgaged to the State to secure a loan from the sinking fund was sold by the State upon the failure of the mortgagor to pay interest. He was about to reinstate the mortgage within the time allowed therefor by law, when, he being largely in debt and insolvent, and intending to delay his other creditors, which intention was known to the purchaser, it was verbally agreed between the mortgagor and purchaser, for the purpose of such delay, that the former should not reinstate the mortgage (and he did not do so); that the latter should hold the land in trust for the mortgagor and permit him to redeem it whenever his relations with his creditors would allow him to do so with safety; and that the mortgagor should pay the purchaser whatever amount the latter might pay the State for interest, which he did for a time, when said purchaser paid the amount due the State, and received from it a deed.

Held, that this was an implied trust under the statute; and the conveyance to said purchaser was void as to said creditors, who were entitled to have the property applied to the payment of their debts without offering to refund the amount paid by said purchaser, who had no lien therefor on the property.

Held, also, that the right of said creditors to have the fraudulent conveyance set aside, including prior judgment-creditors and one who held a mortgage on said property executed prior to said conveyance, was limited to six years from the date at which their cause of action accrued. *Musselman* v. *Kent et al*.....452

5. *Pleading.— Parties.*— Complaint by A. against B., alleging that the plaintiff was the widow of C., who at his death was treasurer of a certain county; that the defendant and others were the sureties on his official bond; that subsequent to C.'s death it was represented to the plaintiff that he was a defaulter in said office, and that his said sureties would have to pay the deficiency; that, for the purpose of saving said sureties from loss, she conveyed to B. certain real estate, on the following express condition: "This conveyance to" B. "is in trust that said land be sold and the proceeds applied towards a payment of the deficiency in the treasury of" said county "which is chargeable against" C., "late treasurer of said county, and his bail, and for no other purpose, said" B. "to be governed as to sale and price by the

majority of the bondsmen of said" C.; that, in truth, there was no such deficiency; that none of the sureties had ever paid anything by reason of their being such sureties; that if there ever was a deficiency and a consequent liability of the sureties, the right of action in favor of said county against said sureties had been barred by the statute of limitations; that the defendants had been in possession of said land from the date of said deed of trust, using it for his own purposes and advantage, enjoying the rents and profits, and keeping the plaintiff out of possession without right; that defendant had in no manner sold or conveyed the land or any part of it for the purpose of executing said trust; that there was not, and never had been, any necessity for a sale for the purpose declared in said deed; that the annual rents and profits of the land had been a certain sum; that the land was her own separate property; and that she had demanded a reconveyance, the possession, and an accounting for the rents and profits, which the defendant had refused. Prayer, for a reconveyance, possession, an accounting for rents and profits, and an injunction restraining the defendant from conveying the land during the pendency of the suit. A copy of the bond of C., as treasurer, and a copy of said deed of trust were filed with the complaint, which was sworn to.

Held, that the complaint stated facts sufficient to entitle the plaintiff to the relief prayed for.

Held, also, that it was not necessary or proper for the plaintiff to make the commissioners of said county parties defendants. *White* v. *Haynes*.540

TURNPIKE.

1. *Subscriptions.—Pleading.—Gravel Road.*—In a suit on a subscription to the capital stock of a gravel road company, made to the articles of association prior to the organization of the company, there was no averment in the complaint that the articles of association had been filed in the office of the recorder of the county in which the road was located, as required by the statute authorizing the organization of the company.

Held, that the complaint was bad on demurrer. *Haun* v. *The Mulberry, &c., Gravel Road Co*.....103

2. *Same.—Statute Construed.*—By the terms of a subscription to the capital stock of a gravel road company, the stock subscribed was payable in such *instalments* as might be called for or required by the directors of the company, and at such times and in such manner as they might direct. The statute under which the company acted authorized the directors to require payments from the subscribers to the capital stock of the sums subscribed by them at such times and in such proportions and on such conditions as they should see fit.

Held, that the directors might require the whole subscription to be paid at one time, or might divide it into such instalments as to them might seem proper.....*Ibid.*

3. *Information.—Assignment of Judgment.*—Information under section 749 of the code, against a gravel road company, for assigning a judgment rendered in its favor, there being no averment that full value was not received on such assignment.

Held, that the information would not lie. *The State, ex rel. Lingenfelter*, v. *The Danville, &c., Gravel Road Co*.133

4. *Same.—Failure to Collect Assessments.*—Such an information will not lie against a gravel road company for collecting only part of the amount of the assessments on particular pieces of land, there being no averment that the amount collected was less than the amount required to complete the road.....*Ibid.*

5. *Same.—Failure to List Lands.*—Where the assessors appointed by the county commissioners, under the act of 1867, to assess the benefits to lands lying within one mile and a half on either side of a gravel road and within a like distance from the terminus, failed to list all the lands benefited;

Held, that this was not ground for an information against the company. *Ibid.*

6. *County Commissioners.—Appeal.*—Any person interested might appeal

from the decision of a board of county commissioners appointing assessors under the act of March 11th, 1867, to assess benefits expected to result to lands from the construction of a gravel road. But there could be no party to the proceeding before said board but the gravel road company; and before an appeal can be taken from the decision of such board by a person not a party, he must file his affidavit of interest in the office of the county auditor, as provided by section 31, 1 G. & H. 253. *Swindler* v. *The Monrovia, &c., Gravel Road Co. et al*.....160

7. *County Commissioners.—Jurisdiction.—Information.*—Where at any time before final action of the board of county commissioners upon a petition to organize a turnpike company under the act of 1865, a number of the petitioners, sufficient to reduce the quantity of land represented by the remaining petitioners to less than three-fifths of all the lands within three-fourths of a mile of the proposed road, file a written withdrawal of their names from the petition, and the commissioners, disregarding such withdrawal, entertain jurisdiction and grant permission to organize the company, an information will lie to impeach the legal corporate existence of the company organized under such authority. *Hord, Pros. Att'y, ex rel. Stanley et al.*, v. *Elliott et al*.....220

8. *License.*—When a legally organized turnpike company has located and constructed its road upon land by the verbal license of the owner of the land, the company is entitled to the possession of the roadway, notwithstanding the fact that damages were not assessed or paid nor any other consideration given for the right of way. *The Harrison, &c., Turnpike Co.* v. *Roberts*.....246

9. *Same.—Toll-House.*—Where, in such case, a toll-house has been erected outside of the roadway, by the license of the owner of the land to use the ground for a toll-house temporarily, such owner or his vendee may recover possession of the ground on which the toll-house is erected, upon his giving the company reasonable notice of the termination of such license, although the toll-house be within the distance from the center of the road to which, under the statute, the company might have condemned the land for a roadway.....*Ibid.*

10. *Act of* 1867.—*Construction of.*—The act of March 11th, 1867 (Acts of 1867, p. 167), authorizing plank, macadamized, and gravel road companies to procure assessments on lands to aid in the construction of their roads, conferred the rights and powers specified in it upon corporations organized after as well as those organized before that act took effect. *Turner et al.* v. *The Thorntown, &c., Gravel R'd Co. et al*...317

11. *Same.—Location of Road.—What Lands to be Viewed, Listed, and Assessed.—Injunction.*—It was necessary under said act of 1867, before the assessors appointed thereunder could proceed to perform their duties therein prescribed, that the road should be located, by selecting and defining the line on which it was to be constructed; and said assessors were required to view *all* the lands within one mile and a half on either side of said road and within the same distance of either terminus thereof, including those within the corporate limits of towns, and to make and report to the county auditor a list thereof, with the assessment of benefit upon those benefitted. A failure to comply with these requirements rendered the assessment void, and an injunction will lie to prevent its collection.....*Ibid.*

12. *Same.—Assessment.—Injunction.* Where assessors appointed under the act of 1867 (Acts 1867, p. 167) failed to view and list any portion of the lands within the limits prescribed by said statute and to assess the benefit that would result thereto from a proper construction of the proposed road, the assessment made by them on other lands is invalid, and a suit to enjoin the collection of such an illegal assessment cannot be barred by showing an assessment of the omitted lands after the commencement of such suit. *Hardwick, Adm'r*, v. *The Danville, &c., Gravel R'd Co. et al*.....321

13. *Same.—Report of Assessors.*—A report of assessors appointed under

said act to the county auditor commenced thus: "Report of assessments made for construction." It was then ruled in columns, headed, "owners' names," "description of land," "amount of assessment;" under which was a list of names of persons, a description of the land owned by each, and the amount assessed against each tract. It then concluded with an affidavit subscribed by said assessors, stating, "that the foregoing list of lands and town lots have been examined by us, and the benefit that a gravel road leading from" a town named "to" another town named "would be to the same has been by us assessed, as shown by the foregoing list, correctly, just, and fair, according to the best of our judgment and ability."

Held, in a suit to enjoin the collection of the assessment made by said assessors, that said report was essentially defective.....*Ibid.*

14. *Same.—Duty of Assessors.—Injunction.*—Assessors appointed under the act of March 11th, 1867 (Acts 1867, p. 167), authorizing plank, macadamized, and gravel road companies to procure assessments on lands, to aid in the construction of their roads, were required to make a list of *all* the lands within one mile and a half on either side of the proposed road, and within the like distance of either terminus thereof, including those in cities incorporated under the general law for the incorporation of cities, assessing those benefited, and to return said list and assessment to the county auditor. An assessment made without compliance with these requirements is void, and an injunction will lie to prevent its collection. *The New Haven, &c., Turnpike Co. et al.* v. *Bird*.....325

15. *Right of Way,—Estoppel—Recovery of Real Estate.*—A proceeding was instituted before a justice of the peace, to condemn the right of way for a turnpike under the act of May 12th, 1852 (1 G. & H. 475, sec. 7), in which damages were assessed to the land-owner, who appealed to the circuit court. After the appeal was taken, the turnpike company tendered the amount so assessed, and took possession of the land. The circuit court dismissed the *cause*, and rendered judgment for costs.

Held, said judgment of the circuit court remaining in force, not appealed from, that it estopped the company from showing that the proceeding before the justice was regular, and the land-owner was entitled to recover possession of the land. *Keicher* v. *The Killbuck Turnpike Co*.....333

16. *Same.—Appeal.—Circuit Court. Jurisdiction.*—On such an appeal to the circuit court, that court has jurisdiction to inquire into the entire case, and not merely as to the amount of damages.....*Ibid.*

V

VACANCY.

See OFFICE AND OFFICER, 3, 4.

VARIANCE.

See CRIMINAL LAW, 10.

VENDOR AND PURCHASER.

See DESCENT, 2; EVIDENCE, 17.

1. *Lien.— Volunteer.— Notice.*— A. held certain real estate by title-bond from B., who held the legal title, A. having fully paid him the purchase-money. C. purchased said real estate from A. and gave his promissory note to A. for a portion of the purchase-money, and A. directed B. to convey to C.; but by C.'s procurement, B., without the knowledge or consent of A., conveyed to C.'s wife, who was a volunteer. Afterwards D. purchased the property from C. and took a conveyance executed by C. and wife, with notice that C. owed the unpaid purchase-money for which he had given said note.

Held, in a suit by the assignee of said note to enforce a vendor's lien upon said land in the possession of D., that the complaint was not insufficient for not alleging that D. had notice that C.'s wife was a volunteer.

Held, also, that A. had an equitable lien on the land for the unpaid pur-

chase-money due him, which lien passed to the assignee of said note. *Johns* v. *Sewell*.....1

2. *Same.— Forfeiture.— Notice.*— A contract for the sale and conveyance of real estate contained a stipulation, that a non-compliance with the terms of the contract, or any of them, by the vendee, should work a forfeiture of all right under the contract at the option of the vendor, but upon previous notice, of a specified period, to the vendee, demanding a fulfilment and specifying such feature or features as it should be deemed had not been complied with.

Held, in an action by the vendee, who had partly performed the contract on his part, against the vendor for wrongfully declaring a forfeiture and thereby putting it out of the power of the vendee to further carry out the contract according to its terms, that the stipulation for said notice was for the benefit of the vendee, and a strict compliance with it by the vendor was necessary before declaring a forfeiture.

Held, also, that where the vendor, after giving to the vendee a notice not in strict compliance with said stipulation, and while the contract was therefore in full force, by declaring a forfeiture put it out of the power of the vendee to carry out his part of the contract, the vendee was not required to perform or offer to perform, but might have his action for being so prevented. *Case* v. *Wolcott*.....5

3. *Same.— Measure of Damages.*— Where after part performance of a contract for the conveyance of real estate, by the vendee, the improvements made by him being contemplated by the contract, the vendor by his own wrongful acts puts it out of the power of the vendee to fully comply with the provisions of the contract, the measure of damages in an action by the vendee against the vendor, for such breach, is the difference between the unpaid purchase-money and the actual value of the lands at the time of the breach .....*Ibid.*

VENUE.

See GAMES OVERRULED, &c., 6; CRIMINAL LAW, 19; JUDGE; LIQUOR LAW, 5, 6.

1. *Change of Venue.—Liquor Law.*— Where an appeal has been duly taken to the circuit court or court of common pleas from the decision of the board of county commissioners upon an application for license to retail intoxicating liquors resisted by remonstrance, such proceeding is a "civil action," and a change of venue may be taken as in other civil actions; the judgment of the court to which the venue is changed is final and without appeal therefrom; and a license duly granted thereunder to the petitioner will protect him against the penalty for retailing without license. *The State* v. *Vierling*.....99

2. *Same.—Rule of Court.*—By a rule of a circuit court, all affidavits for a change of venue were required to be filed one day before the cause was set on the docket for trial or within one day after the issues were closed. After the time so limited, an application was made by the defendant in a prosecution for bastardy in said court, for a change of venue on the ground of prejudice in the county against the defendant, and also prejudice of the presiding judge. The application to remove the case to another county was refused, but another judge was called to preside at the trial, the defendant objecting.

Held, that there was no error. *Reitz* v. *The State, ex rel. Holden*.....187

3. *Same.—From County.*—Where a change of venue is granted in a civil action in the circuit court or court of common pleas because of an objection to the county, under sections 207, 208, and 209 of the code, the cause may be sent on such change to a county in another judicial circuit or district. *Miller* v. *The Toledo, &c., R. W. Co*.....535

VERDICT.

See HUSBAND AND WIFE, 5.

1. *Complaint.— Demand.*— The Supreme Court will not reverse a judgment, in a cause in which there is an answer, because the amount of

the finding is greater than the amount claimed in the complaint. *Robinson* v. *Jamison*.....122

2. *Special Findings of Jury.*—When the special findings of a jury upon particular questions of fact are used to control the general verdict, all the facts to authorize an adverse conclusion should appear by such special answers. *The Bellefontaine R. W. Co.* v. *Hunter, Adm'r*.....335

3. *Special Verdict.*—If a jury merely find the facts covering all the issues being tried, in answer to interrogatories propounded by the court, this is substantially a special verdict. *The Toledo, &c., R. W. Co.* v. *Hammond*.....379

VOLUNTEER.

See VENDOR AND PURCHASER, 1.

W

WAIVER.

See CRIMINAL LAW, 13; INJUNCTION. 7.

Adjourned Term.—After a court of common pleas had made an order that an adjourned term of said court should be held for the purpose of completing the probate business and any other business properly connected with the settlement of decedents' estates and guardianships, and before the time fixed for said adjourned term, the papers in a suit for a divorce were filed in said court on a change of venue, and the parties appeared at said adjourned term and waived all irregularities and consented to go to trial, whereupon the cause was tried at said adjourned term.

Held, that the court had power to try the cause. *Hyatt* v. *Hyatt*.....309

WARRANTY.

Incumbrances. See EVIDENCE, 17; PARTIES, 1.

In sale of personal property. See PLEADING, 6.

WASTE.

See EVIDENCE, 3, 4.

WAY.

See TURNPIKE, 15, 16.

WIDOW.

See DECEDENTS' ESTATES, 5; DESCENT, 1, 2.

WIFE.

See HUSBAND AND WIFE.

WILL.

Contest of. See DECEDENTS' ESTATES, 6.

Construction of.—A will contained the following clauses: "I give and devise to my beloved wife the farm on which we now reside, situate," &c., "containing," &c., "during her natural life, and all the *stock*, household goods, furniture, provisions, and other goods which may be thereon at the time of my decease, during her natural life, she, however selling so much thereof as may be sufficient to pay my just debts;—in case there is not a sufficiency of *stock* to pay my debts, then to dispose of so much of the land as will satisfy the balance; at the decease of my wife the foregoing property to be equally divided between our legal heirs. I authorize my executors, if it shall become necessary to pay my debts, to sell by private sale, or in such manner and upon such terms as they may think proper, any part of my real estate sufficient to pay said debts."

At the time of the execution of the will, which was some years prior to the death of the testator, the value of his domestic animals on the farm exceeded the amount of his indebtedness, and he also owned a large amount of other personal property. At the time of his death, without issue, the live stock owned by him was not sufficient to discharge the liabilities of his estate.

Held, that, for the payment of debts, according to the will, the live stock was first to be exhausted, and next the land was to be resorted to. *Heagy et al.* v. *Cheesman, Adm'r*..96

WITNESS.

See HUSBAND AND WIFE, 4.
Opinion of. See EVIDENCE, 3, 4, 5, 6.
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WORDS AND PHASES.

"*Stock.*" *See* WILL, 1.

"*Demands.*" *See* TAX, 9.
"*Term of Office.*" *See* BAKER *v* KIRK, 517.

WRITTEN INSTRUMENT.

Construction of. See EVIDENCE, 15.
Alteration of. See EVIDENCE, 7.
Copy of. See PLEADING, 1, 9, 13, 15.

END OF VOLUME XXXIII.

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